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MICHAEL RODAK, JR., CL

IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-3881

THE BOARD OF SUPERVISORS
OF FAIRFAX COUNTY, VIRGINIA,
Petitioner,

v.

ROY G. ALLMAN, *Trustee, et al.,*
Respondent.

THE BOARD OF SUPERVISORS
OF FAIRFAX COUNTY, VIRGINIA,
Petitioner,

v.

THOMAS R. WILLIAMS, *et al.,*
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF VIRGINIA

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INDEX

Page

OPINIONS BELOW 2

JURISDICTION 2

QUESTION PRESENTED FOR REVIEW 5

STATUTES INVOLVED 5

STATEMENT OF THE CASE 6

REASONS FOR ALLOWANCE OF WRIT 9

INTRODUCTION 9

I. *Did the Supreme Court of Virginia Misapply the Federal Constitutional Requirement of Equal Protection?* 11

A. The Supreme Court of Virginia Relied on the Equal Protection Clause of the Fourteenth Amendment 11

B. The Supreme Court of Virginia Misinterpreted the Equal Protection Clause of the Fourteenth Amendment 15

1. *The Legislation Invalidated by the Supreme Court of Virginia met Constitutional Requirements as Perceived by This Court* 16

a. The Property Owners Seeking Rezoning were not Members of a "Suspect" Class 16

b. Failure to Rezone the Subject Properties did not Invade a "Fundamental" Right 17

c. The Reaffirmation of the Existing Legislation was Based on a Permissible State Objective 17

Page

d. There was a Rational Relationship Between the Reaffirmation of the Existing Legislation and a Permissible State Interest 20

2. *The Misinterpretation of the Equal Protection Clause of the Fourteenth Amendment by the Supreme Court of Virginia, Resulted in its Misapplication* 23

II. *Did the Supreme Court of Virginia Misapply Federal Constitutional Law on Due Process?* .. 33

A. A Finding of a Denial of Due Process, Based Upon a Denial of Equal Protection, May Not Stand If There Has Been No Constitutional Violation of the Equal Protection Clause 33

B. The Supreme Court of Virginia Misinterpreted the Due Process Clause of the Fourteenth Amendment 35

1. *The Supreme Court of Virginia Relied on the Due Process Clause of the Fourteenth Amendment* 35

2. *The Supreme Court of Virginia Substituted Its Judgment for that of the Legislature* 36

3. *The Substitution of Judgment by the Supreme Court of Virginia was a Misapplication of the Due Process Clause of the Fourteenth Amendment* 43

III. *The Grounds of Decision in the Opinions Below Are Fundamentally Rooted in Federal Constitutional Law; Certiorari Should Be Granted So That This Court May Review the Correctness of the Application of Those Principles* 47

IV. *The Effects of the Allman and Williams Opinions* 52

A. Effects in Fairfax County and in Virginia 52

B. Effects Nationwide 56

CONCLUSION 60

Page

APPENDIX

Allman—Opinion 1

Allman—Order of Denial 16

Petition for Rehearing 16

Allman—Order Staying Execution of Judgment 16

Williams—Opinion 17

Williams—Order Staying Execution of Judgment 44

Opinion—*Board of Supervisors of James City County* v. *Rowe* 44

Notice of Application For A Writ of Certiorari From the United States Supreme Court and Request to Certify and Transmit the Record (Circuit Court of Fairfax County, Virginia) 70

Orders—*Gulf Reston, Inc.* v. *Board of Supervisors of Fairfax County, Virginia*, In Chancery No. 38421 (Circuit Court of Fairfax County, Virginia) 71

Fairfax County Code § 30-2.2.2 (RE-2) 76
§ 30-2.2.2 (RE-1) 83

Va. Code Ann. § 15.1-427 84
§ 15.1-431 85
§ 15.1-446 86
§ 15.1-447 87
§ 15.1-448 88
§ 15.1-449 88
§ 15.1-486 88
§ 15.1-488 89
§ 15.1-489 89
§ 15.1-490 90
§ 15.1-493 90

United States Constitution, Fourteenth Amendment, Section I 92

Constitution of Virginia, Article I, Section 11 92

TABLE OF CITATIONS

Page

CASES:

Appeal of Girsch, 437 Pa. 237, 263 A.2d 395 (1970) .. 19
Appeal of Kit-Mar Builders, 437 Pa. 237, 268 A.2d 675 (1970) 19
Bacon v. *Walker*, 204 U.S. 311 (1906) 15
Berman v. *Parker*, 348 U.S. 26 (1954) 18, 53
Blankenship v. *City of Richmond*, 49 S.E.2d 321 (Va. 1948) 10
Board of Supervisors v. *Carper*, 107 S.E.2d 390 (Va. 1959) 19, 36
Board of Supervisors v. *Davis*, 106 S.E.2d 152 (Va. 1958) 36
Board of Supervisors v. *DeGroff*, 198 S.E.2d 600 (Va. 1973) 36
Board of Supervisors of James City County v. *Rowe*, 216 S.E.2d 199 (Va. 1975) 13, 31, 33
Boggs v. *Board of Supervisors*, 178 S.E.2d 508 (Va. 1971) 36, 39
Buchanan v. *Warley*, 245 U.S. 60 (1917) 17
Citizens' Bank of Michigan City v. *Opperman*, 249 U.S. 448 (1919) 2
Construction of Industry Association of Sonoma County v. *City of Petaluma*, No. 74-2100 (9th Cir., August 13, 1975) 19, 20, 38
County of Fairfax v. *Parker*, 44 S.E.2d 9 (Va. 1947)..14, 36
Downham v. *City of Alexandria*, 58 F.2d 784 (E.D. Va. 1932) 38, 54
Eubank v. *Richmond*, 226 U.S. 137 (1912) 15
Euclid v. *Ambler Realty Co.*, 272 U.S. 365 (1926) ..9, 10, 14, 15, 18, 26, 35, 44, 46, 47, 52, 58
Fairfax County v. *Snell Construction Corp.*, 202 S.E.2d 889 (Va. 1974) 12, 36
Fasano v. *Board of County Commissioners of Washington County*, 507 P.2d 23 (Ore. 1973) 9
Ferguson v. *Skrupa*, 372 U.S. 726 (1963) 43, 45, 47
Gorieb v. *Fox*, 134 S.E. 914 (Va. 1926), *aff'd.*, 274 U.S. 603 (1927) 15
Grams v. *City of Cudahy*, 226 F. Supp. 385 (E.D. Wisc. 1964) 24

Page

Gulf Reston v. *Board of Supervisors of Fairfax County*, Chy. No. 38421 (Cir. Court of Fairfax County, Oct. 22, 1974) 22
Hadacheck v. *Sebastian*, 239 U.S. 394 (1915) 15, 38
Hamilton v. *Regents of University*, 293 U.S. 245 (1934) 4
I.B.M. v. *United States*, 343 F.2d 914 (Ct. Cl. 1965), *cert. denied*, 382 U.S. 1028 (1966) 30
Jamison v. *Texas*, 318 U.S. 413 (1943) 4
King Mfg. Co. v. *City Council of Augusta*, 277 U.S. 100 (1928) 4
Lake Erie & W. R. Co. v. *State Public Utilities Commission*, 249 U.S. 422 (1919) 4
Lathrop v. *Donohue*, 367 U.S. 280 (1961) 4
Lindsley v. *National Carbonic Gas Co.*, 220 U.S. 61 (1911) 18
Louisville Gas Co. v. *Coleman*, 277 U.S. 32 (1928) 26
Martin v. *City of Danville*, 138 S.E. 629 (Va. 1927) .. 51
Mayhue v. *City of Plantation, Florida*, 375 F.2d 447 (5th Cir. 1967) 45
McIntosh v. *Commonwealth*, 191 S.E.2d 791 (Va. 1972) 51
Miles v. *Dade County Board of County Commissioners*, 260 So.2d 553 (Fla. 1972) 41
Minnesota v. *National Tea Co.*, 309 U.S. 551 (1930) 15, 36, 48, 49
Montgomery County Council v. *Shiental*, 238 A.2d 912 (Md. 1968) 59
National Land and Investment Co. v. *Kohn*, 419 Pa. 504, 215 A.2d 597 (1965) 19
Nectow v. *City of Cambridge*, 277 U.S. 183 (1928) 15
North Dakota State Board of Pharmacy v. *Snyder's Drug Stores*, 414 U.S. 156 (1973) 46
Oakwood at Madison, Inc. v. *Township of Madison*, 117 N.J. Super. 11, 283 A.2d 353 (1971) 19
Pennsylvania Coal Co. v. *Mahon*, 260 U.S. 393 (1922) 15
Reed v. *Reed*, 404 U.S. 71 (1971) 16
Respublica v. *Philip Urbin Duquet*, 2 Yeates 493 (Pa. Sup. Ct. 1799) 42
Richmond v. *Randall*, 211 S.E.2d 56 (Va. 1975) 36, 39
Royster Guano Co. v. *Virginia*, 253 U.S. 412 (1920) ... 16
San Antonio School District v. *Rodriquez*, 411 U.S. 1, (1973) 17, 24, 32
Shapiro v. *Thompson*, 394 U.S. 618 (1969) 23

Page

Sherbert v. *Verner*, 374 U.S. 398 (1963) 23
Standard Oil v. *City of Charlottesville*, 42 F.2d 88 (4th Cir. 1930) 38
Stone v. *City of Maitland*, 446 F.2d 83 (5th Cir. 1971) 24, 27, 28, 45, 47
Thomas v. *Collins*, 323 U.S. 516 (1945) 23
Village of Belle Terre v. *Boraas*, 416 U.S. 1, (1974)..16, 17, 18, 24, 26, 27, 29, 32
Welch v. *Swasey*, 214 U.S. 91 (1909) 18, 43
West Brothers Brick Co. v. *City of Alexandria*, 192 S.E. 881 (Va. 1937), *appeal dismissed*, 302 U.S. 658 (1937), *rehearing denied*, 302 U.S. 781 (1938) 10, 14, 15, 35, 56
Ybarra v. *Los Altos Hills*, 503 F.2d 250 (9th Cir. 1974) 18, 27
Wilkins v. *City of San Bernadino*, 175 P.2d 542 (Cal. 1946) 59
Williams v. *Bruffy*, 96 U.S. 176 (1878) 4
Williamson v. *Lee Optical Company of Oklahoma*, 348 U.S. 483 (1955) 27, 28
Yecko v. Township of Pennsylvania, 387 F.2d 126 (3rd Cir. 1967) 24
Zahn v. *Board of Public Works*, 274 U.S. 325 (1927) 15, 38, 51

POSITIVE LAW:

FEDERAL:

Judiciary Act of 1867, 14 Stat. 385 4
Act of 1925, 43 Stat. 936 4
28 U.S.C. § 1257 (1) 3
28 U.S.C. § 1257 (2) 3, 4
28 U.S.C. § 1257 (3) 3
33 U.S.C. § 1251 54
42 U.S.C. § 1857 54
Rules of the Supreme Court of the United States 23(5) 2

Page

STATE

VIRGINIA CONSTITUTION, Article I, § 11 14

Va. Code Ann. § 15.1-427 .....5, 10, 18, 31

§ 15.1-431 55

§ 15.1-446 8

§ 15.1-486 5

§ 15.1-488 17

§ 15.1-489 .....18, 58

Rules of the Supreme Court of Virginia 5:53(a) 2

LOCAL

Fairfax County Code § 30-2.2.2 (RE-1) 5, 18, 20, 25, 39

§ 30-2.2.2 (R-12.5) 46, 55

§ 30-2.2.2 (PDH-3) 20, 46, 55

TEXTUAL MATERIAL

The American Law Institute, *A Model Land Development Code,* Proposed Official Draft No. 1 (1974) 57

Cahn, "Where Do We Go From Here," contained in R. W. Scott, *Management and Control of Growth* (1975) 6

Cohen, *Transcendental Nonsense,* 35 Colum. L. Rev. 809 (1935) 41

Davis, *Administrative Law Cases—Text—Problems,* (1973) 29

Donaldson, *Regulation of Conduct in Relation to Land—The Need to Purge Natural Law Constraints From the Fourteenth Amendment,* 16 Wm. and Mary L. Rev. 187 (1974) 24, 41

Gunther, *Constitutional Law: Cases and Materials* (1975) 44

Page

Mandelker, *The Zoning Dilemma* (1971) 15

Powell & Rohan, *Powell on Real Property* (1968) 42

Sandalow, *Henry* v. *Mississippi and the Adequate State Ground: Proposals for a Revised Doctrine*. Sup. Ct. Rev. 187 (1965) 50

Standard Zoning Enabling Act, U.S. Dept. of Commerce (1922) 57, 58

Stern and Gressman, *Supreme Court Practice* (4th ed., 1969) 3, 61

Williams, *American Land Planning Law* (1974) 35, 37

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PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF VIRGINIA

To: THE HONORABLE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES

The Board of Supervisors of Fairfax County, Virginia, the petitioner herein prays that a writ of certiorari issue to review the judgment of the Supreme Court of Virginia in the above-entitled *Allman* case dated

January 20, 1975 with rehearing denied and decree entered on June 13, 1975, and in the above-entitled *Williams* case entered on June 13, 1975. Because the cases involve identical or closely related questions, a single petition covers the cases pursuant to Rule 23(5) of the Rules of the Supreme Court of the United States.

OPINIONS BELOW

The opinions of the Supreme Court of Virginia are reported as follows: *Board of Supervisors of Fairfax County* v. *Allman*, 215 Va. 434, 211 S.E.2d 48 (1975) and *Board of Supervisors of Fairfax County* v. *Williams*, ——— Va. ———, 216 S.E.2d 33 (1975). These opinions are printed in the *Appendix*,[1] *infra*, at pages 1 and 17, respectively.

The order denying the petition for rehearing in the *Allman* case is printed in the *Appendix, infra*, at page 16.

JURISDICTION

The decision of the Supreme Court of Virginia in *Allman* was dated January 20, 1975. A timely notice and petition for rehearing were filed and pursuant to Rule 5:53(a) of the Rules of the Supreme Court of Virginia the clerk of that court withheld certification of the mandate of the opinion until the petition for rehearing was disposed of. The petition for rehearing was denied on June 13, 1975.[2]

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[1] "*Appendix*" here is italicized to differentiate from "Appendix." The former refers to the printed appendix made part of this petition; the latter refers to appendices of record before the Supreme Court of Virginia.

[2] *See Citizens' Bank of Michigan City* v. *Opperman*, 249 U.S. 448 (1919) (timeliness—petition for rehearing tolls running of filing period).

The decision of the Supreme Court of Virginia in *Williams* was also entered on June 13, 1975.

The jurisdiction of this Court is invoked pursuant to Title 28, United States Code, Section 1257 (3):

> By writ of certiorari, . . . where the validity of a State statute is drawn in question on the ground of its being repugnant to the Constitution . . . .

The meaning that this Court has given to the word "statute" in 28 U.S.C. § 1257(1) and (2) does not differ from the meaning that should be accorded the word "statute" in 28 U.S.C. § 1257(3):

> Since the sta[t]utory references to drawing the validity of treaties and statutes into question are identical with respect to certiorari and to appeals, the same tests are applicable in determining when a "treaty" or a "statute" is involved and whether the "validity" thereof has been determined . . . . The only difference is that for purposes of certiorari it is immaterial whether the state court finds the pertinent law valid or invalid, whereas an appeal may be taken only if the question is decided in a particular way. Stern and Gressman, *Supreme Court Practice,* pp. 87-88 (4th ed. 1969).

The decision not to grant the rezoning classifications at issue in this proceeding are identical to other decisions of a legislative character which this Court has interpreted as "statutes" for purposes of 28 U.S.C. § 1257:

> We think that the order is a "statute" for the purposes of § 1257(2). Under that section, the legislative character of challenged state action, rather than the nature of the agency of the State performing the act, is decisive of the question of jurisdiction. It is not necessary that the state legislature itself should have taken the action

drawn in question. In construing the similar jurisdictional provision in the Judiciary Act of 1867, 14 Stat. 385, we said: "Any enactment, from whatever source originating, to which a State gives the force of law is a statute of the State, within the meaning of the clause cited relating to the jurisdiction of this court." *Williams* v. *Bruffy*, 96 U.S. 176, 183, 24 L.Ed. 716, 717. We likewise said of the provision of the Act of 1925, 43 Stat. 936, which is the present § 1257(2): ". . . the jurisdictional provision uses the words 'a statute of any State' in their larger sense and is not intended to make a distinction between acts of a state legislature and other exertions of the State's lawmaking power, but rather to include every act legislative in character to which the State gives its sanction." *King Mfg. Co.* v. *City Council of Augusta*, 277 U.S. 100, 104, 105, 72 L.Ed. 801, 805, 806, 48 S.Ct. 489. Thus this Court has upheld jurisdiction on appeal of challenges to municipal ordinances, *e.g.*, *King Mfg. Co.* v. *City Council of Augusta*, (U.S.) *supra*; *Jamison* v. *Texas*, 318 U.S. 413, 87 L.Ed. 869, 63 S.Ct. 669, certain types of orders of state regulatory commissions, *e.g.*, *Lake Erie & W. R. Co.* v. *State Public Utilities Com.*, 249 U.S. 422, 63 L.Ed. 684, 39 S.Ct. 345; and some orders of other state agencies, *e.g.*, *Hamilton* v. *Regents of University*, 293 U.S. 245, 257, 258, 79 L.Ed. 343, 349, 350, 55 S.Ct. 197. It is true that in these cases the state agency the action of which was called in question was exercising authority delegated to it by the legislature. However, this fact was not determinative, but was merely relevant to the character of the State's action. The absence of such a delegation does not preclude consideration of the exercise of authority as a statute. *Lathrop* v. *Donohue*, 367 U.S. 820, 824-25 (1961).

QUESTION PRESENTED FOR REVIEW

Did the Supreme Court of Virginia, By a Misinterpretation of the Equal Protection and Due Process Clauses, Misapply the Fourteenth Amendment to the United States Constitution and Thereby Invalidate a Legitimate Exercise of the Police Power of the State?

STATUTES INVOLVED

Section 30-2.2.2. (RE-1; one family residential, 1 acre district) of the *County of Fairfax Zoning Ordinance* is set forth in the *Appendix, infra,* at page 83. However, it was not the general constitutionality of the RE-1 ordinance which was declared to be a violation of the Due Process and Equal Protection Clauses of the Fourteenth Amendment to the United States Constitution.

[Citizenship Rights Not to Be Abridged by States]

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

The case also involves certain planning and zoning enabling legislation. *See* generally, *Va. Code Ann.* § 15.1-427 *et seq.*, pertinent portions of which are set forth in the *Appendix, infra,* p. 84. Of particular importance is *Va. Code Ann.* § 15.1-486, the introductory paragraph of which delegates the police power function of zoning from the state legislature to the local legislature. *Appendix, infra,* p. 88.

STATEMENT OF THE CASE

Fairfax County, Virginia is an urban County located in the Washington, D.C. metropolitan area. It is also the most populous jurisdiction in the Commonwealth of Virginia. In the fifteen-year period from 1957 to 1972 the County's population increased by approximately 150 percent, growing from 207,000 persons in 1957 to 502,856 persons in 1972. This population explosion created a chaotic situation in the County, and placed monumental strains on the public facilities and other resources of the County.[3]

Faced with problems attendant to the population explosion, it became apparent to the Board of Supervisors of Fairfax County, the local governing body, that its zoning and planning decisions would have to take into account the availability of public facilities.[4]

These cases involve the applications of private landowners to a local governing body for an amendment to the zoning ordinance as it affected their respective

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[3] *Allman*, Appendix II, pp. 142-49, Appendix III, p. 74.

[4] One commentator, discussing Fairfax County specifically, has noted:

> As in many other "bedroom communities near major cities, citizens in Virginia's Fairfax County realized a few years ago that uncontrolled growth was heading their county toward a crisis. In this 400-square-mile area a half-hour from downtown Washington, schools were jammed, sewage treatment were overloaded, and traffic clogged the roads. The county had grown from 22,000 in 1920 to 98,000 in 1950 and 453,000 in 1970. It was run by a board of supervisors whose majority still believed in growth at all costs. Taxes were skyrocketed as costs of additional schools and county-provided services exceeded revenue from new residents. R. Cahn, "Where Do We go From Here," contained in R. W. Scott, *Management and Control of Growth*, p. 61, 79 (1975).

properties.[5] In each case the local governing body declined to amend the zoning ordinance for various zoning and planning reasons including the inadequacy of public facilities at that time to support the higher density residential developments requested.

In each case the landowners filed suit in the Circuit Court of Fairfax County, charging among other things a denial of due process and equal protection as guaranteed by the United States Constitution (*Allman,* Appendix I, p. 5; *Williams,* Appendix I, pp. 4, 16, 23).

In *Allman* the trial court ruled that other properties had been placed in more intense, and thus more profitable, zoning districts and that the reaffirmation of the existing zoning therefore constituted unlawful discrimination. (*Allman,* Appendix I, p. 11). In *Williams* the trial court also ruled that other properties had received higher intensity zoning and that therefore the retention of existing zoning was unlawful. (*Williams,* Appendix I, p. 28).

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[5] *Board of Supervisors of Fairfax County, Virginia* v. *Allman, supra,* involved a tract of land for which Roy G. Allman, Trustee, was the lead rezoning applicant, plaintiff at trial, and appellee in the Supreme Court of Virginia. For the sake of clarity, "*Allman,*" as hereinafter used, refers to the opinion of the Supreme Court of Virginia, "Mr. Allman" refers to the property owners in their individual capacities, and "the Allman property," or similar language, refers to the parcel as a tract of land.

Board of Supervisors of Fairfax County, Virginia v. *Williams, supra,* involved two similar rezoning cases, consolidated for judicial review at both the trial and appellate levels. No substantial factual difference exists between the two adjoining parcels involved, in character, cost, or location. "*Williams,*" as hereinafter used, refers to the opinion of the Supreme Court of Virginia, "Mr. Williams" refers to the property owners in their individual capacities, and "the Williams Property," or similar language, refers to the two adjoining parcels as tracts of land.

The Board petitioned and was granted an appeal in each case by the Supreme Court of Virginia. The Board contended that there was no violation of due process or equal protection. (*Allman*, Brief of Appellant, pp. 15-30, Petition for Rehearing, pp. 5-6; *Williams*, Brief of Appellant, pp. 14-33). The Briefs of Appellees in both *Allman* and *Williams* charged violations of Articles V and XIV (sic, Amendments V and XIV) of the United States Constitution (*Allman*, Brief of Appellees, p. 44; *Williams*, Brief of Appellees, p. 40), and clearly presented the relevant federal issues to the Supreme Court of Virginia.

In *Allman* the subject property was zoned RE-1 which allowed 273 single family homes on the 300-acre tract. Mr. Allman requested zoning which would have permitted 988 units. The comprehensive plan for the area proposed the subject property for future development consistent with the density figures of the Allman proposal but had no time frame for implementation.[6]

The Supreme Court of Virginia primarily concerned itself with discrimination, *i.e.*, a violation of equal protection.[7]

Other properties in the general area had received higher density zoning and had, therefore, received an economic benefit by virtue of legislative action.

The Board of Supervisors' position was that public facilities inadequacies forced the local government to

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[6] Under *Va. Code Ann.* § 15.1-446 the plan shows the planning "commission's long-range recommendations for the general development of the territory covered by the plan." Section 446 is set out in full at *Appendix, infra*, p. 86.

[7] His [*Allman's*] evidence established a course of action by the Board that was inconsistent and discriminatory. *Allman*, 211 S.E.2d at 55 (Va. 1975).

discriminate rationally in rezonings. The Supreme Court of Virginia recognized that there was evidence on both sides of the public facilities adequacy question, but upheld the trial court nonetheless, finding the legislative decision to be constitutionally impermissible.

In 1970 and 1971, the landowners involved in *Williams* applied for rezoning in neighborhoods of the Middle Run watershed of the County contrary to the sequential policy of the applicable comprehensive plan, which provided for urban density development after 1975. These requests were denied in late 1972. The trial was held in July of 1973.

The Supreme Court of Virginia held, *inter alia,* that the actions taken under the timing aspects of the comprehensive plan violated the Equal Protection Clause,[8] upholding the trial court's finding of unconstitutionality.

After determining the legislative actions of the Board of Supervisors to be unconstitutional, the Supreme Court of Virginia remanded the cases to the trial courts for action which would strip the Board of its future legislative discretion.

REASONS FOR ALLOWANCE OF WRIT

INTRODUCTION

Zoning is an act by which government regulates the private use of land for the public good. *Euclid* v. *Ambler Realty Co.*, 272 U.S. 365 (1926). The act of zoning is either legislative or quasi-judicial. *Compare Euclid* v. *Ambler Realty Co., supra,* with *Fasano* v.

[8] "The effect of the application of the Board's Middle Run policies was to discriminate between similarly-situated property." *Williams,* 216 S.E.2d at 41.

Board of County Commissioners of Washington County, 507 P.2d 23 (Ore. 1973). Virginia follows the majority rule that zoning is a legislative act. *Board of Supervisors of Fairfax County* v. *Allman*, 211 S.E.2d 48 (Va. 1975); *Blankenship* v. *City of Richmond*, 49 S.E.2d 321 (Va. 1948); *West Bros. Brick Co.* v. *City of Alexandria*, 192 S.E. 881 (Va. 1937); *Va. Code Ann.* § 15.1-427 *et seq.*, *Appendix, infra*, p. 84.

In misapplying the constitutional interpretations of this Court, the Supreme Court of Virginia invalidly restricted the police power of the State which has been delegated to Fairfax County by the Virginia General Assembly in the field of zoning. *See Blankenship* v. *City of Richmond*, 49 S.E.2d 321, 325 (Va. 1948) (zoning power delegated to locality); *see also Va. Code Ann.* §§ 15.1-427 *et seq.*; *Euclid* v. *Ambler Realty Co.*, 272 U.S. at 387 (zoning ordinances find their justification in the police power).

This Court has so insisted on deference to the state police power that it has rarely granted review to cases arising in the land use field since *Euclid*. The essence of the *Euclid* doctrine with respect to the relationship between zoning and planning and federal constitutional law is found in the following language:

> . . . before the ordinance can be declared unconstitutional, (it must be said) that such provisions are clearly arbitrary and unreasonable, having no substantial relation to the public health, safety, morals, or general welfare. *Euclid* v. *Ambler Realty Co.*, 272 U.S. at 395.

In *Euclid*, therefore, this Court spoke of the right of a municipality to "govern itself as it sees fit within limits of the organic law of its creation and the State

and Federal Constitutions." By misconstruing the Fourteenth Amendment, the Supreme Court of Virginia has made it impossible for the Fairfax County Board of Supervisors, "representing a majority of its inhabitants and voicing their will" to exercise its police power under the State and Federal Constitutions. *Id.*, at 389.

I. DID THE SUPREME COURT OF VIRGINIA MISAPPLY THE FEDERAL CONSTITUTIONAL REQUIREMENT OF EQUAL PROTECTION?

A. The Supreme Court Of Virginia Relied On The Equal Protection Clause Of The Fourteenth Amendment.

The Supreme Court of Virginia often uses the term "discrimination" interchangeably with a specific reference to a violation of equal protection. This becomes clear in the dissent in *Williams* and in a zoning case decided by that court on June 13, 1975, the same day it decided *Williams* and denied rehearing in *Allman*. The following quotes from the three zoning cases show the court's reliance:

In *Allman*:

> . . . Allman, although entitled to equal treatment in the consideration of his application, had been subjected to discrimination, had not been accorded the same treatment as other applicants for rezoning . . . *Allman*, 211 S.E.2d at 52.
>
> * * *
>
> Allman has overcome the presumption of legislative validity that attached to the action of the Board in reaffirming a RE-1 classification for his land. His evidence established a course of action that was inconsistent and discriminatory. *Id.* at 55.

In *Williams*:

> In the trial court, the inquiry focused upon two issues: (1) [public facilities] and (2) whether the Board's denial of the rezoning requests was discriminatory. *Williams*, 216 S.E.2d at 35.
>
> * * *
>
> Thus, the trial court found . . . it was discriminatory and therefore arbitrary and capricious to deny higher-density zoning to the land in question. *Id.* at 36.
>
> * * *
>
> The effect of the application of the Board's Middle Run Policies was to discriminate between similarly-situated property . . . . This is the same type discriminatory practice described as arbitrary and capricious and therefore condemned in *Board of Supervisors of Fairfax County* v. *Allman* . . . . *Id.* at 41.

Equal protection was specifically acknowledged in the *Williams* dissent of Justice Cochran:

> The applicants contend that the Board breached its own comprehensive plan by denying the requested rezoning and approving higher-density rezoning for other applicants similarly situated. The Board correctly maintains that the comprehensive plan is not a zoning ordinance but is merely a guideline. *Fairfax County* v. *Snell Corp., supra*, 214 Va. at 660, 292 S.E.2d at 894 (1974). However, adherence to or departure from the Plan may be considered in determining whether the Board has acted reasonably in fixing zoning classifications and in acting on the rezoning applications of the applicants and others similarly situated, or *whether it has denied the applicants their constitutional right to equal protection.* *Williams*, 216 S.E.2d at 46 (dissenting opinion) (Emphasis added.)
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> * * *

> Mere inequality of treatment among neighboring landowners is not of itself unconstitutional. Any zoning ordinance may involve unequal treatment, but such unequal treatment is proscribed only when it is invidious, or "arbitrary and capricious." In *Allman*, we affirmed the rule that unequal treatment of similarly situated landowners is "arbitrary and capricious" when it lacks a rational basis and bears no substantial relation to the public health, safety, morals, or general welfare . . . . The classifications established here by the Board were based on a rational plan for orderly development of a subwatershed. *Id.* at 47.

In *Board of Supervisors of James City County* v. *Rowe*, 216 S.E.2d 199 (Va. 1975), a zoning case decided contemporaneously with *Williams* but written by a different Justice than *Allman* or *Williams*, the court stated:

> We consider . . . whether the B-2 zoning of the subject property to the exclusion of other areas is a discriminatory classification in violation of the equal protection guarantee . . . . *Id* at 205.
>
> * * *
>
> Adjacency is always relevant to the question of discriminatory zoning classification, but adjacent properties may be zoned differently when there is a rational basis for the different classifications. [Citations omitted] . . . Zoning classifications of adjoining areas enjoy the presumption of legislative validity and equal protection until the presumption is overcome by evidence of discrimination. *Id.* at 206.
>
> * * *
>
> When a land use permitted to one landowner is restricted to another similarly situated, the restriction is discriminatory, and, if not substantially related to the public health, safety, or welfare, constitutes a denial of equal protection of the laws. *Id.* at 210.

It is clear from the dissent in *Williams* and the analysis in *Rowe* that the Supreme Court of Virginia equates "invalid discrimination" with a "violation of equal protection." The Constitution of Virginia has no equal protection clause.[9] The pleadings of *Allman* and *Williams* charged violations of the Fourteenth Amendment to the United States Constitution.[10] In addition, the Virginia cases cited for controlling principles in *Allman*, 211 S.E.2d at 54,[11] are based on the decisions of this Court interpreting the Fourteenth

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[9] The Virginia Constitution merely defines certain classes of persons protected against governmental discrimination, none of which are applicable here. *Va. Const.*, Article I, Section 11 states:

> *Due process of law; obligation of contracts; taking of private property; prohibited discrimination; jury trial in civil cases.*— That no person shall be deprived of his life, liberty, or property without due process of law; that the General Assembly shall not pass any law impairing the obligation of contracts, nor any law whereby private property shall be taken or damaged for public uses, without just compensation, the term "public uses" to be defined by the General Assembly; and that the *right to be free from any governmental discrimination upon the basis of religious conviction, race, color, sex, or national origin shall not be abridged*, except that the mere separation of the sexes shall not be considered discrimination.
>
> That in controversies respecting property, and in suits between man and man, trial by jury is preferable to any other, and ought to be held sacred. The General Assembly may limit the number of jurors for civil cases in courts of record to not less than five. (Emphasis added)

[10] *Allman*, Appendix I, p. 5; Brief of Appellees, p. 44; *Williams*, Appendix I, p. 4, p. 16, p. 23; Brief of Appellees, p. 40.

[11] *Quoting County of Fairfax* v. *Parker*, 44 S.E.2d 9, 11-12 (Va. 1947):

> For a discussion of the underlying principles see *Village of Euclid* v. *Ambler Realty Co.*, 272 U.S. 365, 47 S. Ct. 114, 71 L.Ed. 303, 54 A.L.R. 1016; *West Bros. Brick Co.* v. *City of Alexandria*, 192 S.E. 881. . . .

Amendment.[12] *Williams*, of course, relies on *Allman* and the same Virginia cases. It is therefore, inescapable that the Supreme Court of Virginia relied upon the Equal Protection Clause of the United States Constitution as the touchstone of its decisions in *Allman* and *Williams*.[13]

B. The Supreme Court Of Virginia Misinterpreted The Equal Protection Clause of the Fourteenth Amendment.

The Supreme Court of Virginia clearly relied on the Equal Protection Clause of the Fourteenth Amendment in reaching its decisions in both *Allman* and *Williams*. However, it is this Court, and not a state court, which is the final arbiter of important issues under the Federal Constitution. This Court's corrective power asserted and utilized in *Minnesota* v. *National Tea Co.*, 309 U.S. 551, 557 (1930), should be exercised here because the court below, in its reliance on the Fourteenth Amendment, ignored or misapplied the rulings of this Court with respect to the proper interpretation of the equal protection guarantee as it affects matters of zoning and planning under the state police power.

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[12] The root case is *Euclid* v. *Ambler Realty Co.*, 272 U.S. 365 (1926). The landmark Virginia zoning case was *West Bros. Brick Co.* v. *City of Alexandria*, 192 S.E. 881 (Va. 1937), *appeal denied*, 302 U.S. 658, *rehearing denied*, 302 U.S. 781. *West Bros. Brick* relied on this Court's decisions in *Goriech* v. *Fox*, 274 U.S. 603 (1927); *Eubank* v. *Richmond*, 226 U.S. 137 (1912); *Bacon* v. *Walker*, 204 U.S. 311 (1906); *Zahn* v. *Board of Public Works*, 274 U.S. 325 (1927); *Hadacheck* v. *Sebastian*, 239 U.S. 394 (1915); *Pennsylvania Coal Co.* v. *Mahon*, 260 U.S. 393 (1922); *Nectow* v. *City of Cambridge*, 277 U.S. 183 (1928); and, of course, *Euclid*. All other Virginia cases listed by the court below cite and derive their principles from *West Bros. Brick*.

[13] If differences do not exist or if differences exist which cannot be justified before the court, then in conventional constitutional terms he claims a denial of the Equal Protection of the Law. D. Mandelker, *The Zoning Dilemma*, p. 8 (1971).

From *Euclid, supra, to Village of Belle Terre* v. *Boraas*, 416 U.S. 1 (1974), this Court has determined that the Equal Protection Clause of the Fourteenth Amendment cannot be used to displace a rational exercise of the police power by the appropriate zoning authority. Unless a zoning ordinance involves a "suspect" classification or some "fundamental" right or liberty guaranteed by the Constitution, the judicial review of zoning legislation mandated by the Equal Protection Clause is clear.

> We deal with economic and social legislation where legislatures have historically drawn lines which we respect against the charge of violation of Equal Protection Clause if the law be "reasonable, not arbitrary" (quoting *Royster Guano Co.* v. *Virginia*, 253 U.S. 412, 415 (1920)) and bears "a rational relationship to a [permissible] state objective." *Reed* v. *Reed*, 404 U.S. 71, 76 (1971). *Village of Belle Terre* v. *Boraas*, 416 U.S. 1, 8 (1974).

1. The Legislation Invalidated by the Supreme Court of Virginia Met Constitutional Requirements as Perceived by This Court.

a. The property owners seeking rezoning were not members of a "suspect" class.

Both Mr. Allman and Mr. Williams were members of classes of landowners within the Upper Potomac Planning District and Pohick Planning District, respectively, whose properties had not been rezoned to the higher densities or more intense uses which the plans contemplated for some time in the future. There was another class of landowners in each planning district whose property had been rezoned to higher intensities than RE-1, some as high as shown by the plans for ultimate development potential. Neither classification was "suspect" as, for example, an ordinance might be which segregated an area for one race. *Vil-*

lage of Belle Terre v. *Boraas, supra,* 416 U.S. 1, 6 (1974), *citing Buchanan* v. *Warley,* 245 U.S. 60 (1917).[14]

b. Failure to rezone the subject properties did not invade a "fundamental" right.

The zoning decisions complained of did not invade a "fundamental" right. Both Mr. Allman and Mr. Williams complained that their properties would have been worth approximately $2.5 million more if the zoning ordinance had been amended pursuant to their wishes at the time they desired the amendment. This Court has found that economic expectations are not a "fundamental" right guaranteed by the United States Constitution. *Village of Belle Terre* v. *Boraas,* 416 U.S. 1, 7 (1974). *See also San Antonio School District* v. *Rodriguez,* 411 U.S. 1, 24 (1973).

The classifications involved no suspect class nor the invasion of a fundamental right. There is no violation of the Equal Protection Clause, then, if the acts are reasonable, not arbitrary, and bear a rational relationship to a permissible state objective. *Village of Belle Terre* v. *Boraas,* 416 U.S. 1, 8 (1974).

c. The reaffirmation of the existing legislation was based on a permissible state objective.

The Board of Supervisors reaffirmed or declined to amend the existing RE-1 zoning district applicable to the Allman and Williams properties primarily because of present public facility considerations.[15] While disa-

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[14] The concept of equal treatment for landowners in Virginia has been codified in a uniformity provision, *Va. Code Ann.* § 15.1-488, *Appendix, infra* p. 89. This requires that the regulations of land in the same zoning district (*e.g.*, RE-1) apply similarly to all

[15] *See, e.g., Allman,* Appendix II, p. 24, Brief of Appellant, p. v; *Williams,* Appendix I, p. 42, Brief of Appellant, p. iii. The properties in that district.

greeing with the Board on conclusions, the Supreme Court of Virginia recognized this purpose in its opinions. In *Allman,* the court reviewed public facilities at length and even quoted a member of the Board of Supervisors, who dissented on the vote to retain RE-1, finding that the majority of the Board was concerned with inadequate public facilities. *Allman,* 211 S.E.2d at 51. In *Williams,* the court stated, "The Board takes the position that its denial of the rezoning requests was 'mandated by state law and deficiencies in public facilities.' " *Williams,* 216 S.E.2d at 35. *See Va. Code Ann.* §§ 15.1-427, 15.1-489, *Appendix, infra,* p. 84.

This Court has recognized specifically in *Euclid* that the "evils of overcrowding, and the like" are valid considerations for the legislature. 272 U.S. at 388. It is a very small jump, if there is a difference at all, to a recognition that a local legislature pursues a constitutionally permissible objective when it seeks to protect against overcrowding of people, whether permanently, or as in the instant cases temporarily, in relation to the public facilities which make life livable.[16] Since the

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Supreme Court of Virginia presumably recognized the validity of public facilities considerations by its lengthy factual review in each opinion. A lengthy factual review may not have been necessary. This Court has gone so far as to impute knowledge and intent to a legislative body in order to uphold a legislative act. *Welch* v. *Swasey,* 214 U.S. 91 (1909). *See also, Lindsley* v. *National Carbonic Gas Co.,* 220 U.S. 61, 78 (1911).

[16] *Berman* v. *Parker,* 348 U.S. 26 (1954); *Ybarra* v. *City of Los Altos Hills,* 503 F.2d 250 (9th Cir. 1974). *See also, Village of Belle Terre* v. *Boraas,* 416 U.S. at 13-14 (Marshall, J., dissenting).

The *Williams* majority makes passing reference equating the refusal to rezone as zoning with an impermissible exclusionary effect:

> Another discriminatory effect, although perhaps unintended of the Board's zoning policies was to elevate the cost of build-

objective was a permissible one, the causality or rationality of the relationship between the acts of the Board and the objectives remain.

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ing sites and housing and thus tend to exclude from portions of Fairfax County those persons who do not have 'substantial means' to 'afford to move into the County.' Zoning action with similar exclusionary effect was held impermissible in *Board of Supervisors of Fairfax County* v. *Carper, supra. Williams,* 216 S.E.2d at 41.

Additionally, unlike *Carper* and its progeny [*Oakwood at Madison, Inc.* v. *Township of Madison,* 117 N.J. Super, 11, 283 A.2d 353 (1971); *Appeal of Kit-Mar Builders,* 437 Pa. 237, 268 A.2d 675 (1970); *Appeal of Girsh,* 437 Pa. 237, 263 A.2d 395 (1970); *National Land and Investment Co.* v. *Kohn,* 419 Pa. 504, 215 A.2d 597 (1965)] the instant cases were temporary rather than permanent decisions, and were dictated by public facility considerations rather than a desire to exclude classes of persons from the locality.

The theme of Justice Sutherland's opinion in *Euclid* is that an exclusionary consequence is: (1) the essence of zoning; and (2) does not of itself rise to a cognizable due process objection.

A recent federal case demonstrates the approach this Court has mandated with respect to alleged exclusionary effects of zoning in the context of an alleged Fourteenth Amendment violation. In *Construction Industry Association of Sonoma County* v. *City of Petaluma,* No. 74-2100, U.S. Court of Appeals for the Ninth Circuit, Slip Opinion, August 13, 1975, the Court of Appeals reversed a district court decision voiding as unconstitutional certain aspects of the city's five-year housing and zoning plan. A particular feature of the Petaluma plan was to set a housing development growth rate not to exceed 500 dwelling units per year.

The plaintiffs had claimed that the plan was arbitrary and capricious and violative of the Fourteenth Amendment. Plaintiffs gave particular emphasis to the argument that the Petaluma plan constituted exclusionary zoning.

> Practically all zoning restrictions have as a purpose and effect the exclusion of some activity or type of structure or a certain density of inhabitants. *And in reviewing the reasonableness of a zoning ordinance, our inquiry does not terminate with a finding that it is for an exclusionary purpose.* We must determine further whether the exclusion bears any rational relationship to a legitimate state interest. If it does

d. There was a rational relationship between the reaffirmation of the existing legislation and a permissible state interest.

It is obvious that the higher the density of residential development allowed by zoning restrictions, the more people will exist on a particular piece of land, and the higher the demand for and impact on public facilities.[17] Therefore, if public facility capabilities were questionable, one logical approach would be to retain lower density zoning. This act—reaffirmance or denial of change—would bear a rational relationship to the permissible state objective of preventing undue density in regard to those facilities. The courts below, trial and appellate, however, were concerned with the substantive value of decisions made by the legislative body, where legislative change had been requested by individual landowners.

When Mr. Allman and Mr. Williams appeared before the Board of Supervisors requesting legislation, the Board after appropriate notice and hearings denied their requests. When Mr. Allman and Mr. Williams

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not, then the zoning regulation is invalid. If, on the other hand, a legitimate state interest is furthered by zoning regulations, we must defer to the legislative act. Slip Opinion, p. 13 (emphasis added).

In *Williams*, as in *Petaluma*, the dissenting opinion of Justice Cochran ably demonstrates that the temporary exclusion of a high density development was predicated on a legitimate state interest, the concern that new public facilities were needed more where there already was high density development and that the facilities were inadequate for the type of land use sought in the rezoning application.

[17] The fact that a higher density zoning would have a greater impact on the area was noted specifically by the court:

> The existing RE-1 zoning permitted 273 single family homes on the subject property. Allman proposed 988 units under the PDH-3 category. *Allman*, 211 S.E. 2d at 49.

appeared in court, they cited other zoning actions as examples of legislative inconsistency, each of which can clearly be distinguished from the respective properties.[18]

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[18] But even more significant than the higher density granted in the areas of Hiddenbrook, Herndon, Sterling Park and Reston, which either adjoin or are in close proximity to Allman, is the action of the Board taken on the application of the Clinch Corporation for a rezoning of its land. *Allman*, 211 S.E.2d at 53.

Mr. Allman, contending that he had been denied equal protection, argued that: his land was similarly situated to a number of properties in the area; some of these were treated differently by the legislature (rezoned to higher density); his property was not; and therefore he had been discriminated against. As examples of "similarly situated properties" he noted:

1) *Hiddenbrook* (151 acres) was rezoned to higher density six to twelve years (1960, 1965, 1966) before Allman was denied. It adjoined Allman and was only beginning to be developed at the time of the Allman denial in late 1971. (*Allman*, Stip. Exhibit 1, p. 4). It would, therefore, impact exactly the same public facilities at the same time.

2) *Herndon* is an incorporated town and as such controls its own rezonings. However, being within Fairfax County, residents impact County schools and other public facilities in the area of the Allman property. The Board, therefore, could not control the rezonings but was required to respond to their impact.

3) *Sterling Park* is a housing development in Loudoun County over which the Fairfax County Board had absolutely no control. The development does impact Fairfax County roads.

4) *Reston* is a world renowned experiment in building a new town which was formed in 1962 two and a half miles from Allman. Two years after Allman was denied and after a successful school bond issue affecting Reston (*Allman*, Reply Brief of Appellant, pp. 8-9), the Board rezoned two applications in Reston involving 625 acres. The Upper Potomac Comprehensive Plan (*Allman*, Stip. Exhibit 3) which covers the area (43,699 acres) had no phasing or timing provisions as did the plan in *Williams*. However, the plan had been consistently interpreted to call for growth and the provision of finite public facilities within the density core of Reston before rezoning outlying areas such as Allman. *Allman*,

This court has consistently indicated that there is no denial of equal protection where differently situated people are treated in different manners. In *Allman* and *Williams*, the only "similar situation" was that their

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211 S.E.2d at 53. In addition, the Fairfax County Circuit Court has ruled that Reston is entitled to priority in the provision of public facilities at least insofar as sewage treatment is concerned. (See *Appendix*, *infra*, p. 71).

5) *Clinch*, a mile from Allman, was rezoned to higher density about the time Allman was denied and was the main concern of the Virginia courts. Soon thereafter it was downzoned because the Board felt that a mistake had been made, but the downzoning was invalidated by subsequent litigation. At any rate, the impact of Clinch on public facilities was much smaller than that of Allman. Allman consisted of 300 acres, Clinch of 65; Allman would have generated 1,200 school children, Clinch 202 (*Allman*, Appendix II, p. 110); and Allman would have produced 6,000 vehicle trips per day, Clinch less than one-fifth those trips (*Allman*, Appendix III, p. 163).

In *Allman*, the Supreme Court of Virginia helps document the public facilities problems in the area as follows: *schools*—double shifts, extended days, temporary classrooms, accelerated building program, realignment of school district lines, busing (twice the normal distance, *Allman*, Appendix II, pp. 99-100), *Allman*, 211 S.E.2d at 51; *fire service*—not up to national standards used by Fairfax County (such standards recommended by the comprehensive plan, *Allman*, Stip., Exhibit 3, pp. 67-8) but "not critical," *Allman*, 211 S.E.2d at 51; *sewerage treatment*—allocation system because supply limited, *Allman*, 211 S.E.2d at 51; and *roads*—Route 228 through the Allman property was shown on the comprehensive plan for improvement to four lanes, however, the Virginia Department of Highways had not designated it for improvement in their ten-year plans. (*Allman*, Appendix II, p. 66, Appendix III, p. 165).

Mr. Williams' property was within the Pohick Planning District, an area with a comprehensive plan that was time-phased, unlike other comprehensive plans. (Discussion, note 29; *infra*.)

Williams' applications for rezoning were denied pursuant to the plan and the plan's rationale of coordinating public facilities to already existing development and to new areas by stages. Other properties had been rezoned to plan densities in the Pohick. How-

land was planned for more intense ultimate uses under the same comprehensive plans as the land of other persons whose applications for rezoning had been previously granted. No other factor exists by which a determination of "similarly situated" can appropriately be made.

2. The Misinterpretation of the Equal Protection Clause of the Fourteenth Amendment by the Supreme Court of Virginia resulted in its misapplication.

The Supreme Court of Virginia did not hold that economic expectations are a "fundamental" right guaranteed by the United States Constitution.[19] Rather,

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ever, no rezonings had occurred in the neighborhood where the Williams property lay.

As in *Allman*, the court in *Williams* helped to document public facility considerations in the area as follows: *roads*—evidence that road system inadequate for higher density development, *Williams*, 216 S.E.2d at 38 and 3; *schools*—no "serious" deficiency, neighborhood school policy where young children should walk to neighborhood schools only an "ideal," children could be "absorbed" without "undue burden," *Williams*, 216 S.E.2d at 38, possible double shifts, and temporary classrooms, *Williams*, 216 S.E.2d at 43 (dissent); and *sewerage*—treatment facilities not presently available, *Williams*, 216 S.E.2d at 38.

[19] If the court below had considered economic expectation to be a "fundamental" right, it would follow that the court would then require the Board to show a compelling state interest to have the legislation upheld. *Shapiro* v. *Thompson*, 394 U.S. 618, 634 (1969). In the very sensitive area of a "fundamental" right, such as in a First Amendment guarantee,

> [i]t is basic that no showing merely of a rational relationship to some colorable state interest would suffice; in this highly sensitive constitutional area, "[o]nly the gravest abuses, endangering paramount interests, give occasion for permissible limitation," *Thomas* v. *Collins*, 323 U.S. 516 (1945). *Sherbert* v. *Verner*, 374 U.S. 398, 406 (1963).

At any rate, speculation is academic because this Court has held that economic expectations are not a fundamental right. *Village*

the court below seemed to hold that a selective denial of economic advantage raised, *per se*, violations of equal protection. In *Allman*, the Supreme Court of Virginia paraphrases the trial court:

> . . . Allman, although entitled to equal treatment in the consideration of his application, had been subjected to discrimination, had not been accorded the same treatment as other applicants for rezoning, and had been deprived of substantial property rights. *Allman*, 211 S.E.2d at 52.
> *See also Williams*, 216 S.E.2d at 36 and 39 for parallel reasoning. [20]

The court notes in both cases that the properties would have been more valuable if rezoned. *Al-*

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of Belle Terre v. *Boraas*, 416 U.S. 1, 8 (1974). Cases in the lower federal courts in the last decade [*Stone* v. *City of Maitland*, 446 F.2d 83 (5th Cir. 1971); *Yecko* v. *Township of Penn.*, 387 F.2d 126 (3rd Cir. 1967); *Grams* v. *City of Cudahy*, 226 F. Supp. 385 (E.D. Wisc. 1964)],

> "contain no implication that courts should consider the private detriment suffered and attempt to balance it against the public interest; rather the rational relationship required by the Fourteenth Amendment is a causal relation between the regulation and effectuation of a proper public purpose. A regulation therefore that reasonably promotes the public interest by prohibiting a harm or encouraging a benefit will be upheld, even though it burdens private individuals." Donaldson, *Regulation of Conduct in Relation to Land—The Need to Purge Natural Law Constraints From the Fourteenth Amendment*, 16 Wm. and Mary L. Rev. 187, 209-10 (1974).

See also San Antonio School District v. *Rodriquez*, *supra*, 411 U.S. 1, 24 (1973) ". . . at least where wealth is involved, the Equal Protection Clause does not require absolute equality or precisely equal advantages."

[20] It should be noted that neither Allman, Williams, the trial court nor the appellate court claimed or found a denial of procedural due process based on any lack of the notice or hearing requirements being complied with.

lman, 211 S.E.2d at 50, *Williams*, 216 S.E.2d at 39. In other words, other landowners received higher, more valuable zoning, Allman and Williams did not, and, therefore they did not receive equal treatment (or equal profits).

The court below apparently held the Board's failure to legislate equal profits to be a violation of equal protection because in neither case did the court find a denial of due process based on a taking or confiscation. In both cases the same expert witness for Allman and Williams testified that the RE-1 (existing zoning) could be developed at a profit. (*Allman*, Appendix III, p. 14; *Williams*, Appendix I, p. 137).[21] As the dissent in *Williams* notes, in both cases "the present RE-1 zoning does not of itself effect an unconstitutional denial of due process by depriving the applicants of all beneficial use of their property." *Williams*, 216 S.E.2d at 44.

That the Supreme Court of Virginia perceived a *per se* violation of equal protection is further exemplified by that court's failure to address whether the lines drawn as a means to a permissible state end were rational.

Line drawing is the essence of the police power and deference to it is also the touchstone of this Court's approach to zoning under the Equal Protection Clause of the Fourteenth Amendment. Much has been made

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[21] It should be noted that the Supreme Court of Virginia in both *Allman*, 211 S.E.2d at 50, and *Williams*, 216 S.E.2d at 39, states both could develop "without loss" and "not lose money" respectively. Apparently, the court is quoting statements from the *Allman* Appellees briefs (*Allman* Brief of Appellees, p. 43) rather than from the testimony of the Allman and Williams witness in the records, that development could be at a profit. In *Williams*, this is correctly stated by the dissent, 216 S.E.2d at 44 and 46-47.

of the fact that the Williams and Allman properties were similarly situated to those of other landowners whose property fell, for them, on the more fortunate side of the line. But this Court answered that objection in *Euclid* where it candidly acknowledged what must be said if zoning and planning are to be possible and if every zoning decision is not to be litigated to destruction on spurious equal protection grounds: [The line] "which in this field separates the legitimate from the illegitimate assumption of power is not capable of precise delimitation. It varies with circumstances and conditions." *Euclid* v. *Ambler Realty Co.*, 272 U.S. 365, 387 (1926). And more recently:

> When a legal distinction is determined, as no one doubts that it may be, between night and day, childhood and maturity, or any other extremes, a point has to be fixed or a line has to be drawn, or gradually picked out by successsive decisions, to mark where the change takes place. Looked at by itself without regard to the necessity behind it the line or point seems arbitrary. It might as well or nearly as well be a little more to one side or the other. But when it is seen that a line or point there must be, and that there is no mathematical or logical way of fixing it precisely, the decision of the legislature must be accepted unless we can say that it is very wide of any reasonable mark. *Village of Belle Terre* v. *Boraas*, 416 U.S. 1, 9, note 5 (1974), *quoting Louisville Gas Co.* v. *Coleman*, 277 U.S. 32, 41 (1928) (dissenting opinion).

Recent zoning cases in the lower courts show that on the whole the meaning of that "respect' for line-drawing in zoning, spoken of in *Belle Terre*, has been well understood. An analysis of these cases exposes the degree to which the decisions below depart from the

traditional approach in zoning cases by courts to a charge of a violation of the Equal Protection Clause.

Ybarra v. *Los Altos Hills,* 503 F.2d 250 (9th Cir. 1974), reveals the extent to which the Supreme Court of Virginia misapplied the Equal Protection Clause. In *Ybarra,* the Ninth Circuit concluded its equal protection analysis as follows:

> Since there is no suspect classification requiring a strict standard of review, the town need only show that the ordinance bears a rational relationship to a legitimate governmental interest. *Id.* at 40, 93 S.Ct. 1278. Here the ordinance is rationally related to preserving the town's rural environment. See *Village of Belle Terre* v. *Boraas,* —— U.S. ——, 94 S.Ct. 1536, 39 L.Ed.2d 797 (1974). The ordinance does not violate the Equal Protection Clause. *Id.*, at 254.

Absent any grounds for concluding that a "fundamental liberty" or a "suspect classification" is present, all Fairfax County is required to show is a rational relationship behind its decisions to change or not to change the existing zoning ordinance and "a legitimate governmental interest."

Another case which contrasts sharply with *Williams* and *Allman* and which illustrates the appropriate approach to zoning where an equal protection objection has been raised is *Stone* v. *City of Maitland,* 446 F.2d 83 (5th Cir. 1971). The Court of Appeals in *Maitland* relied on this Court's famous distinction between permissible legislative differential treatment of similar subject matter and a violation of the Equal Protection Clause in *Williamson* v. *Lee Optical Company of Oklahoma,* 348 U.S. 483, 489 (1955):

> The problem of legislative classification is a perennial one admitting of no doctrinaire definition.

> *Evils in the same field may be of different dimensions and proportions, requiring different remedies.* Or so the legislature may think. * * * Or the *reform may take one step at a time*, addressing itself to the phase of the problem which seems most acute to the legislative mind * * * The legislature may select one phase of one field and apply a remedy there, neglecting the others. * * * The prohibition of the Equal Protection Clause goes no further than the invidious discrimination. (Emphasis added.)

Upon application of the *Williamson* v. *Lee Optical* analysis to the *Allman* and *Williams* cases, it is evident that the Supreme Court of Virginia misapplied the meaning of equal protection as defined in the decisions of this Court. The legislature does not have to treat Mr. Allman's rezoning application identically with that of Clinch.

Similarly, in *Williams*, the fact that rezoning applications in adjacent neighborhoods did not produce identical results to those rezoning applications in the neighborhood of the Williams property does not violate equal protection. As the Court of Appeals said in *Maitland*:

> It is important to recognize exactly what the Equal Protection Clause entails. If the legislature senses an evil, it may deal with it. At the same time it is under no compulsion to deal with all other evils that are seen to be equally serious. *Stone* v. *City of Maitland*, 446 F.2d 83, (5th Cir. 1971).

The Equal Protection Clause is not a strait jacket to frustrate zoning and planning. As a matter of federal constitutional law, the question is whether the com-

plained of line-drawing is permissible under the Equal Protection Clause. In *Belle-Terre*, this Court said unequivocally that legislative line-drawing in zoning was not prohibited by the Equal Protection Clause:

> But every line by a legislature leaves some out that might well have been included. That exercise, however, is a legislative not a judicial function. *Village of Belle Terre* v. *Boraas*, 416 U.S. 1, 8 (1974).

That one falls on a different side of a line than does one's neighbor may be in some ultimate perspective an inequity but it is not an inequity which arises to a constitutional dimension.

The shallowness of the landowner's allegations of discrimination in these cases is particularly illustrated in *Allman*. There the landowner stressed that he was treated differently than Clinch, though allegedly similar under the comprehensive plan. And in truth the Fairfax County Board of Supervisors had conceded mistake. *Allman*, 211 S.E.2d at 53. But a mistake by government with respect to one individual does not mean that the government violates equal protection unless it makes the same mistake with respect to every other individual so situated. Davis, *Administrative Law Cases—Text—Problems*, p. 552 (1973). What the Supreme Court of Virginia has done is to take a particularly rigid and undefined conception of estoppel against the government which would give a windfall for those as to whom no mitake has been made, and elevate that estoppel to a false constitutional status.

If true, as the Supreme Court of Virginia indicates, the Equal Protection Clause has become an ob-

stacle to the fundamental task of government.[22] Governmental error in Virginia is set in concrete on a misinterpretation of the Federal Equal Protection Clause. Equal Protection principles, properly understood, particularly in zoning, are far more sensible and flexible as even the most cursory reading of *Euclid* and *Belle Terre* reveals.

The landowners' broader bootstrap-estoppel argument, that other areas where zoning had occurred were just as deficient in public facilities and therefore equal protection mandated rezoning for their deficient area, also apparently was accepted by the court below.[23]

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[22] Even where courts have given a windfall to one taxpayer because a mistake benefiting another taxpayer similarly situated had been made, no suggestion has ever been made that such equality of treatment had any source in equal protection analysis. *Cf. IBM v. United States*, 343 F.2d 914 (Ct. Cl. 1965), *cert. den.* 382 U.S. 1028 (1966).

[23] Apparently, this accommodation [school children from Allman's project] would occur in *the same manner the County has accommodated the steady increase in school population in other sections of the County.* This could be done, Whitworth testified, by an accelerated building program, temporary classrooms, extending the school day, going on a double shift, realignment of school district lines and transporting children from congested areas to areas where there were vacant or unfilled classrooms. *Allman*, 211 S.E.2d at 51. (Emphasis added.)

Fire services for Allman did not meet national standards used by the County but the court said this was "not critical" and "roughly the same as that provided numerous other areas in the County." *Id.*

In *Williams*, the court said that there was evidence of road inadequacy but other evidence that it would be improved sometime in the future. In the past, road improvement had followed development. *Williams*, 216 S.E.2d at 38. Also, the neighborhood school concept, where small children could walk to school, was labeled by the court as an "ideal" not followed in practice. *Id.*

This theory by the court below seems to invalidate *Va. Code Ann.* § 15.1-427 which states that the planning and zoning enabling chapter is intended to improve the health, safety and general welfare. This theory of equal protection, in other words, requires the continuance of the lowest common denominator of public facility inadequacy countywide.

This estoppel-equal protection theory not only violates the mandates of the state enabling act, but it also violates the very essence of a police power action for the health, safety and general welfare.

The Supreme Court of Virginia obviously substituted judicial judgment for the legislative judgment of the Board of Supervisors. In both cases, the court stated that there was evidence of public facility adequacy and inadequacy. The trial court "could have found" present or future availability, *Allman,* 211 S.E.2d at 51. "There was evidence of road inadequacy and potential adequacy," *Williams,* 216 S.E.2d at 38. The appellate court also took new evidence on appeal: "Allman's counsel, in his brief and at the bar of this court, said that . . ." *Allman,* 211 S.E.2d at 53.[24]

The fundamentally mistaken issue posed by the court below was not whether there was any evidence to support the legislature but whether there was evidence to support the trial court. *Williams,* 216 S.E.2d at 36. The court also recites and thereby approves the fact

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[24] *Compare Board of Supervisors of James City County* v. *Rowe, supra,* 216 S.E.2d 199, 211, note 10 (Va. 1975)—"In oral argument, the Board volunteered information that. . . . We will not notice such information *de hors* the record." (*Appendix, infra,* p. 44).

that a stipulation solicited at trial by the judge changed the factual setting from that which had faced the legislature. *Williams,* 216 S.E.2d at 39 (*see also Williams,* Appendix I, pp. 29-31).

The classifications of the Fairfax County Zoning Ordinance applicable to the subject properties clearly received strict judicial scrutiny for their justification. However, to engage in strict judicial scrutiny on the basis of federal law, the court must first find that a "fundamental" right has been invaded or that a "suspect" classification was created. *San Antonio School District* v. *Rodriguez,* 411 U. S. 1 (1973). The court did neither. Economic expectations are not a "fundamental" right. *Village of Belle Terre* v. *Boraas,* 416 U.S. 1 (1974). Those whose property has not been rezoned to the long-range densities recommended in a comprehensive plan have none of the

> . . . traditional indicia of suspectness: the class is not saddled with such disabilities, or subjected to such a history of purposeful unequal treatment, or relegated to such a position of political powerlessness as to command extraordinary protection from the majoritarian political process. *San Antonio School District* v. *Rodriguez, supra,* 411 U. S. at 28.

Therefore, the court below erred in invading the legislative prerogatives without basis pursuant to an equal protection review. It is not the province of the courts "to create substantive constitutional rights in the name of guaranteeing equal protection of laws." *Id.,* 411 U.S. at 33.

Petitioner, therefore, respectfully submits that the misinterpetation of the Equal Protection Clause of the

Fourteenth Amendment resulted in a misapplication of the Constitution of the United States.

II. DID THE SUPREME COURT OF VIRGINIA MISAPPLY FEDERAL CONSTITUTIONAL LAW ON DUE PROCESS?

A. A Finding Of A Denial Of Due Process, Based Upon A Denial Of Equal Protection, May Not Stand If There Has Been No Constitutional Violation Of The Equal Protection Clause.

The analysis of the Supreme Court of Virginia creates a constitutional domino effect in which a finding of an equal protection violation necessarily results in a finding of a due process violation which necessarily results in the court finding the legislative act invalid. This is clearly stated by the court in *Board of Supervisors of James City County* v. *Rowe,* 216 S.E.2d 199, 210 (Va. 1975), the land use case decided on the same day as *Williams*:

> When a land use permitted to one landowner is restricted to another similarly situated, the restriction is discriminatory, and, if not substantially related to the public health, safety, or welfare constitutes a denial of equal protection of the laws. A restriction on the right to use which thus *denies equal protection also constitutes a "taking"* of one of the most valuable components of the package of private property rights, and, absent just compensation, *such taking is a denial of due process of law.* (emphasis added).

The same constitutional domino effect is evident in both the *Allman* and *Williams* decisions:

> His evidence established a course of action by the Board that was inconsistent and discriminatory. A discriminatory action is an arbitrary and a capricious action, and bears no reasonable relation to

> the public health, safety, morals or general welfare. *Allman,* 211 S.E. 2d at 55.
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> * * *
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> . . . (4) it was discriminatory and *therefore* arbitrary and capricious to deny higher-density zoning to the land in question. *Williams,* 216 S.E.2d at 36 (emphasis added).
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> * * *
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> Mere inequality of treatment among neighboring landowners is not of itself unconstitutional. Any zoning ordinance may involve unequal treatment, but such unequal treatment is proscribed only when it is invidious, or "arbitrary and capricious." In *Allman* we affirmed the rule that unequal treatment of similarly situated landowners is "arbitrary and capricious" when it lacks a rational basis and bears no substantial relation to the public health, safety, morals, or general welfare. *Id.* at 47 (dissenting opinion).

The fact that a finding of discrimination or denial of equal protection was a necessary underpinning of any due process determination is evident in the dissent of Justice Cochran. He states that although the lower court's findings concerning the present or future availability of public facilities "may be sufficient to show that the requested rezoning would be reasonable, [it] is not of itself sufficient to invalidate the present zoning as to applicants' lands." *Id.* at 44.

Inasmuch as the first domino in the series above was the court's determination that equal protection was violated, the other dominoes cannot fall if there was no legitimate finding of an equal protection violation. The major, if not sole, basis for a finding of due process violation was the determination that the property owners had been discriminated against in such manner as

to deny them equal protection.[25] When there was in fact no equal protection violation, there then logically could have been no due process violation, whether such perceived violation conflicted with the Federal or State Constitutions. The third and last domino, the legislation itself, must logically stand.

B. The Supreme Court Of Virginia Misinterpreted The Due Process Clause Of The Fourteenth Amendment

1. The Supreme Court of Virginia Relied on the Due Process Clause of the Fourteenth Amendment.

The Supreme Court of Virginia in *Allman* based its holding on the Fourteenth Amendment to the United States Constitution and this Court's interpretations thereof. The court cited *Euclid* v. *Ambler Realty Co.*, 272 U.S. 365 (1926), and *West Bros. Brick Co.* v. *City of Alexandria*, 192 S.E. 881 (Va. 1937), *appeal dismissed*, 302 U.S. 658, *rehearing denied*, 302 U.S. 781, as the seminal cases for the general principles governing its review of zoning laws. *Allman*, 211 S.E.2d at 54. *West Bros. Brick*, the landmark Virginia case on zoning, is clearly based on this Court's interpretations of the Fourteenth Amendment to the United States Constitution. In addition to *Euclid*, the Supreme Court of Virginia in *West Bros. Brick* cited a number of United States Supreme Court cases as authority for

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[25] The tension between the ideal of legal and political equality and the fact of economic inequality sets up many of the basic conflicts in American planning. *Differential treatment is of the essence in American land use controls.* Since by definition a formal and mechanical equality is out of the question, the only way to provide the essence of equal treatment for these basic social interests is by an overall planning analysis of all the major factors bearing upon the situation. N. Williams, 1 *American Land Planning Law* § 1.01. (1974) (emphasis added).

its decisions.[26] The other cases cited by the court in *Allman* are based on *West Bros. Brick* and the federal principles enunciated therein.[27]

The *Williams* case is based on *Allman* and the same principles and line of authority which controlled that decision. *Williams*, 216 S.E.2d at 40-41. The Supreme Court of Virginia may no more misinterpret the due process clause of the Fourteenth Amendment than it may misinterpret the equal protection clause. *See Minnesota* v. *National Tea Co.*, 309 U.S. 551. (1930).

2. The Supreme Court of Virginia Substituted Its Judgment for That of the Legislature.

In *Allman*, the Supreme Court of Virginia made findings of fact which it substituted for determinations made by the Board;[28] in *Williams*, the court up-

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[26] See cases cited at footnote 12, *supra.*

[27] *See Fairfax County* v. *Parker*, 44 S.E.2d 9, 12, (Va. 1947) (*citing West Bros. Brick* and *Euclid*); *Board of Supervisors* v. *Davis*, 106 S.E.2d 152, 157 (Va. 1958) (*citing West Bros. Brick*); *Board of Supervisors* v. *Carper*, 107 S.E. 390 (Va. 1959) (*citing West Bros. Brick*). *See also Boggs* v. *Board of Supervisors*, 178 S.E.2d 508, 510 (Va. 1971); *Board of Supervisors* v. *DeGroff*, 198 S.E.2d 600, 601 (Va. 1973); *Fairfax County* v. *Snell Corp.*, 202 S.E.2d 889, 893 (Va. 1974); *Richmond* v. *Randall*, 211 S.E.2d 56, 60 (Va. 1975) (all *citing Carper* and thereby *West Bros. Brick*).

[28] The Board's posture in the *Allman* case was basically:

(1) the Board had planned that in the long-range future, the area of the County that included the Allman tract would be permitted to develop at a density of 2-3 units to an acre (*Allman*, Stip. Exhibit 3). This density would require the immediate provision of certain public facilities such as sewer and water. Other facilities, such as schools, roads, fire service, would be required shortly after development. (*Allman*, Appendix II, pp. 172-73, 194, 202, 207).

(2) for the present, if the properties in this immediate area wished to develop, they could do so at the present zoning density.

held findings of fact which the trial court had substituted for determinations of the Board.[29]

This density does not generally require the provision of major public services such as sewer and water, but can be developed on wells and septic systems; further the impact of this density development is obviously less on the major facilities of roads and schools. (*Allman*, Appendix III, p. 14).

(3) for the present, the Board had not planned for provision of certain major facilities which it felt to be prerequisite for development at increased densities (*Allman*, Appendix II, pp. 172, 194, 202). Prior planning for one critical facility, sanitary sewer, had recently been disrupted by an office of the United States Department of Interior, now the Environmental Protection Agency, by the reduction of capacity of the Blue Plains Regional Pollution Control Plant. (*Allman*, Appendix II, p. 39-40; 214-15. Stip. Exhibits 4 & 5).

The Supreme Court of Virginia, in its opinion, itself noted that ". . . the witnesses for the Board stressed the present inadequacy of all public facilities in the area." *Allman*, 211 S.E.2d at 50. However, the Court went on to state:

> There was evidence before the lower court from which it reasonably could have found that at the time the Board considered the Allman application the necessary public facilities were either available or would become available by the time the project had been developed. *Allman*, 211 S.E.2d at 51.

[29] The Board's posture in the *Williams* case was basically:

(1) the Board had planned for the north watershed (Main Branch) to develop at urban density during the period after 1969, and for the provision of public facilities to be directed to this watershed during this period. (*Williams*, Stip. Exhib. 11).

(2) the Board had planned for the central watershed (Middle Run) to begin to develop to urban density between 1975 and 1980; and for the south watershed (South Run) to develop after 1980. (*Williams*, Stip. Exhib. 11). *See also Williams*, 216 S.E.2d at 42. (dissenting opinion).

(3) "the Board, which plans to provide such facilities, had determined to change the density by rezoning after public facilities were available or reasonably expected." *Williams*, 216 S.E.2d at 45-46 (dissenting opinion).

Williams, with property in the Middle Run, appeared before the Board in 1972 requesting that his property be rezoned at that

The federal courts have consistently refused to substitute their judgment for that of legislative bodies. *Standard Oil* v. *City of Charlottesville*, 42 F.2d 88 (4th Cir. 1930); *Downham* v. *City of Alexandria*, 58 F.2d 784 (E.D. Va. 1932).

In the recent case of *Construction Industry Association of Sonoma County* v. *City of Petaluma*, No. 74-2100 (9th Cir., August 13, 1975), the District Court was reversed because the Court of Appeals concluded that the trial court had weighed the wisdom of the Petaluma plan rather than its reasonableness.

> Being neither a superlegislature nor a zoning board of appeal, a federal court is without authority to weigh and reappraise the factors considered or ignored by the legislative body in passing the challenged legislation. The reasonableness, not the wisdom, of the Petaluma plan is at issue in this suit. Slip Opinion, p. 13.

The Ninth Circuit, in making these observations is clearly following the precedents of this court. *Hadacheck* v. *Sebastian*, 239 U.S. 394 (1915); *Zahn* v. *Board of Public Works*, 274 U.S. 325 (1927). When a state court sets aside a legislative decision on federal constitutional grounds, that court is then bound by this

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time. The Board denied the request, basing such denial on the plan considerations noted above with emphasis on the present unavailability of public facilities and the statement by Williams that he planned to begin development in six to eight months. (*Williams*, Stip. Exhibit 4, p. 16).

The Board, by virtue of its decision not to rezone the Williams property, had determined that public facilities were not available nor programmed to be available in the reasonably near future.

However, one of the "four important findings" repeated in the *Williams* decision was that "public facilities were or soon would be available to serve the land in question . . ." *Williams*, 216 S.E.2d at 39. The court found the record to be supportive of this finding.

Court's interpretations and may not substitute its judgment for that of the legislature.[30]

The majority opinion in *Williams* says, in essence, that in the opinion of that court the landowners in question should have been granted a higher density zoning classification. But that difference in opinion cannot authorize a constitutionally compelled conclusion that the refusal to rezone was arbitrary and capricious.

In dissent, Justice Cochran said in *Williams*:

> The uncontradicted evidence shows that, unlike the zonings invalidated in *City of Richmond* v. *Randall, supra,* and in *Boggs* v. *Board of Supervisors,* 178 S.E.2d 508 (Va. 1971), *the present RE-1 zoning does not of itself effect an unconstitutional denial of due process by depriving the applicants of all beneficial use of their property.* It was stipulated that the property could be developed at some profit under RE-1 zoning. The evidence indicates that much greater profit could be realized from higher density development. (Emphasis added).
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> The evidence shows that higher density zoning for the subject lands would not be unreasonable. Our concern, however, is the reasonableness of the Board's actions in continuing the present zoning. If that is fairly debatable, then the denial of the applications must be upheld.
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> The Board's evidence shows that its policy was to retard development in the Middle Run until

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[30] The Supreme Court of Virginia acknowledges this concept in *Allman*, where it discusses the impropriety of courts usurping or invading the exercise of legislative power. *Allman,* 211 S.E.2d at 55.

> public facilities could be made available to other areas already zoned to higher density and under development. *Williams,* 216 S.E.2d at 44 (dissenting opinion).
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> The classifications established here by the Board were based on a rational plan for orderly development of a subwatershed. The Board was justified in pursuing its policies of encouraging greater density in areas already zoned for such development by locating public facilities there before rezoning other lands and incurring the financial burden of installing additional public facilities.
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> The Board adduced sufficient evidence of the reasonableness of its actions in denying the applicants' request for higher density zoning to make the matter at least fairly debatable. *Reasonable men could disagree as to the advisability of approving the applications at the time they were considered by the Board.* Consequently, I conclude that the chancellor erred in ruling that the Board's legislative actions in denying the applications and in continuing the zoning were arbitrary, unreasonable, and capricious. *Id.*, at 47 (emphasis added).

When members of a distinguished state supreme court divide on the question of the "reasonableness" of a zoning classification, it seems impossible to conclude that the minority position on the matter is "unreasonable."[31] It is clear that the objection the Supreme

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[31] Legislation falls within the "due process" clause when it is such as rational men may approve. Taken seriously, this conception makes of our courts lunacy commissioners sitting in judgment upon the mental capacity of legislators and, occasionally, of judicial brethren. . . . The fact, then, that rea-

Court of Virginia had with the action of the Fairfax County Board of Supervisors in *Williams* was not with the reasonableness of the refusals to rezone in *Williams* but with its wisdom. When such an objection claims for its legal justification the language of the due process clause of the Fourteenth Amendment, such judicial substitution of legislative judgment becomes constitutionally unacceptable.

Petitioner submits that the "crucial question" under the Fourteenth Amendment is not whether the Supreme Court of Virginia, giving due deference to the trial court's finding of fact, can find evidence to support the trial court and reverse only if the trial court is clearly wrong. *Williams,* 216 S.E.2d at 36. The deference afforded the trial court should have been given to the legislature. Lengthy argument in the Briefs of Appellants showed the Board's contention that the trial courts substituted their judgment. For example, the trial court in *Allman* stated as constitutional principles:

> An owner has a basic vested right to use his property for any legitimate purpose as long as it does not constitute a nuisance nor is contrary to

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sonable men approve of specific legislation does not prevent it from being a violation of "due process of law." Donaldson, *Regulation of Conduct in Relation to Land—The Need to Purge Natural Law Constraints From The Fourteenth Amendment,* 16 Wm. and Mary L. Rev. 187, 195 (1974), *quoting* Cohen, *Transcendental Nonsense,* 35 Colum. L. Rev. 809, 819 (1935).

See Miles v. *Dade County Board of County Commissioners,* 260 So.2d 553, 555 (Fla. 1972)—"fact that Zoning Appeals Board held a view . . . opposite to . . . county commissioners . . . furnished indication that the matter was fairly debatable."

the health, safety and general welfare of the public. (*Allman,* Order, Appendix I, p. 11.) [32]

* * *

However, under the free enterprise system and under his basic vested property rights, you can't deny him economic gain advantages. (*Allman,* Oral Ruling, Appendix III, pp. 219-20.)

* * *

What's fair for the goose is fair for the gander. (*Allman,* Appendix II, p. 220.)

The appellate court compounded the error by giving a presumption of correctness to the trial court.[33] Instead of searching for any evidence to uphold the trial

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[32] As one looks back along the historic road traversed by the law of land in England and in America, one sees a change from the viewpoint that he who owns may do as he pleases with what he owns, to a position which hesitatingly embodies an ingredient of stewardship; which grudgingly, but steadily, broadens the recognized scope of social interest in the utilization of things. The first sixty-eight chapters of this Treatise are full of illustrations of these transitional changes in the law. R. Powell and P. Rohan, *Powell on Real Property,* p. 852, (abridged ed. 1968).

Compare, trial court's cited statement *with Respublica* v. *Philip Urbin Duquet,* 2 Yeates 493 (Pa. Sup. Ct. 1799).

[33] The failure of the trial courts to afford the Board a presumption of validity and the reversal of that presumption were treated at length. (*Allman,* Brief of Appellant, pp. 50-68; *Williams,* Brief of Appellant, pp. 33-49.) Since *Allman* is the lead case, several quotes from the trial judge, later approved *sub silentio* by the reviewing court, should show the reversal of presumption.

> You as their counselor were put in an untenable position, because you've got to scrounge around and dig up technical defenses to try and put them in this record in order to support the verdict, the decisions of the Board. (Statement of trial court to Board's counsel at trial—*Allman,* Appendix II, p. 213.)
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> Can you show that that [sewer treatment capacity] was one of the major factors that the Board waived [sic, weighed]

court, the appellate court should have searched for any reasonable basis to uphold the legislature's judgment.[34]

3. The Substitution of Judgment by the Supreme Court of Virginia was a Misapplication of the Due Process Clause of the Fourteenth Amendment.

In *Ferguson* v. *Skrupa,* 372 U.S. 726, 731-32 (1963), Justice Black, speaking for the Court, made the follow-

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in considering this? (Question by trial court to Board's counsel—*Allman,* Appendix II, p. 213.)

In *Williams* there was also a clear indication very early that the judge would not give the legislature a presumption of validity and would in fact reverse that presumption. In opening statement, counsel for Mr. Williams said that the county could not demonstrate an inadequacy of public facilities. The court inquired about sewer treatment. Counsel for Mr. Williams admitted there was none but stated that there would be three years later. The court then solicited a stipulation that Williams would not use a favorable ruling as a lever to develop before sewer treatment capacity became available. (*Williams,* Appendix I, pp. 29-31 of transcript I.) This occurred before any evidence was taken. The court presumed that development would take six to seven years (*Williams,* Appendices I, p. 76; II, pp. 360, 460, 480; III, p. 525) although Mr. Williams had earlier stated to the Board of Supervisors that it would be half completed in two years (Stip. Exhibit 4, p. 16). This changed the whole time frame involved. The Board had to consider the time frame of 1972 (hearing before Board) to 1976 (four years for Williams to build). The trial court with its stipulation was considering 1976 (sewer treatment) to 1983 (seven years to build), an entirely different set of facts from that facing the legislature. Obviously, a substitution of judgment occurred.

[34] This Court has gone so far as to allow the state court to impute knowledge and motives to a legislative body in order to sustain the constitutionality of legislation which was challenged on due process and equal protection grounds. In fact, after noting the holding of the state supreme court, this Court went on to impute further knowledge and rationale to the legislative body to sustain the decisions of both the court and the legislature. *Welch* v. *Swasey,* 214 U.S. 91 (1909).

ing declaration on the impropriety of using due process analysis as a means to substitute judicial for legislative judgment:

> We refuse to sit as a "superlegislature to weigh the wisdom of legislation," and we emphatically refuse to go back to the time when courts used the Due Process Clause "to strike down state laws, regulatory of business and industrial conditions because they may be unwise, improvident, or out of harmony with a particular school of thought." [35]

In *Williams* and *Allman*, the court below engaged as a *de novo* matter in the pros and cons of particular refusals to make new zoning classifications on federal constitutional grounds.

In *Allman*, the courts below have substituted their judgment for that of the zoning authority, despite ritual incantations to the contrary. In their view, since Clinch's land was rezoned and Reston's applications were granted, it was arbitrary, and, *a fortiori*, unreasonable to deny Allman's application for rezoning. But the mandate of this Court in *Euclid* was that the zoning decision stands if it furthers a legitimate

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[35] This Court, in zoning cases, had declared its unwillingness to use the due process clause of the Fourteenth Amendment as a vehicle to supplant the legislative authority's zoning judgment long before this Court abandoned substantive due process analysis in other areas of economic regulation. Constitutional scholars have commented on the disfavor this Court very early indicated toward the technique of using a doctrine of reasonableness to scrutinize legislative judgment. Professor Gunther describes this Court's aversion to substantive due process as follows:

> During the heyday of economic due process, a divided Court sustained a general zoning ordinance as a valid "police regulation," in *Euclid* v. *Ambler Realty Co.*, 272 U.S. 365 (1926). Gunther, *Constitutional Law: Cases and Materials*, p. 602 (1975).

state interest. This mandate can accomplish its appointed task (*i.e.*, giving a proper deference to a valid exercise of the police power of the state), only if it is understood that the due process test is whether it can be said that the zoning decision bears no reasonable relationship to a legitimate state interest, not whether a particular zoning decision appears reasonable to the reviewing court.

In the instant cases, *Williams* and *Allman*, the Court below recites arguments showing the utility of the approach to the instant zoning classifications favored by the landowners in each of those cases. But such arguments must be won or lost before the zoning authority and not the courts.[36]

In *Allman*, the Supreme Court of Virginia gives lip service to the doctrine, well established under the de-

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[36] In *Ferguson* v. *Skrupa*, 372 U.S. 726, 730-31 (1963), Mr. Justice Black speaking for the Court sounded the death knell of substantive due process:

> We have returned to the original constitutional proposition that courts do not substitute their social and economic beliefs for the judgment of legislative bodies, who are elected to pass laws.
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> *Unquestionably, there are arguments showing that the business of debt adjusting has social utility, but such arguments are properly addressed to the legislature, not to us.* (emphasis added).

By way of contrast, in *Stone* v. *City of Maitland*, 446 F.2d 83, 87 (5th Cir. 1971), the Fifth Circuit fully applied the test set forth in *Euclid:*

> Thus in testing the zoning ordinances before us here the sole question is whether there is a rational relationship between the ordinance and the promotion of some aspect of the City's police power—a label which describes the full range of legitimate public interests. *Quoting Mayhue* v. *City of Plantation, Florida*, 375 F.2d 447, 449 (5th Cir. 1967).

cisions of this Court, that the legislative judgment will not be disturbed with respect to zoning unless it is unreasonable and arbitrary. The problem is not that the court below has not stated the appropriate constitutional doctrines established for zoning cases where either equal protection or due process violations are alleged under the Fourteenth Amendment. The problem is rather that the court misapplied these doctrines. The test is not whether a court thinks a landowner's preferred use for a piece of property is a reasonable one. The test is rather whether a zoning authority's contrary judgment is reasonable with respect to the appropriate classification for that piece of property. After stating at length the doctrine that a presumption of validity is owed to the zoning authority's judgment, the court then concludes that Allman had overcome the presumption. The court's statement of the remand to the trial court betrays that the basis for its conclusion that Mr. Allman overcame the legislative presumption rests on a *judicial* judgment that his use of the land would be reasonable.[37]

This Court repudiated the doctrine of substantive due process in zoning before it rejected it across the board in matters affecting economic and property rights. *Compare Euclid* v. *Ambler Realty Co.*, 272 U.S. 365 (1926), with *North Dakota State Board* v. *Snyder's Drug Stores*, 414 U.S. 156 (1973). The Fifth

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[37] *It having been established by the evidence that the uses of the property proposed by Allman are reasonable uses* and that either zoning classification PDH-3 or zoning classification R-12.5 would permit such uses, the trial court will also enjoin the Board during the prescribed period from taking any action which would disallow these uses by Allman (appellees). *Allman*, 211 S.E. 2d at 55-56.

Circuit has accurately summarized the movement of the law in this area:

> It has now been a generation since the Supreme Court's due process scythe cut down all national efforts towards economic recovery and endangered the role of the judiciary as a co-equal branch of government. But, oddly enough, ten years *before* the great Court battle of the thirties, the . . . Court wrote an opinion in language . . . reminiscent of *Ferguson* . . . . It must be said that the (zoning) ordinance can be declared unconstitutional, that such provisions are clearly arbitrary and unreasonable, having no substantial relation to the public health, safety, morals, or general welfare. *Euclid* v. *Ambler Realty Co.*, 1926, 272 U.S. 365, 395, 47 S.Ct. 114, 121, 71 L.E. 303, 314. *Stone* v. *City of Maitland*, 446 F.2d 83, 87 (5th Cir. 1971).

This Court's careful scrutiny is required to prevent a re-emergence of the substantive due process scythe at the state court level which threatens to cut down all efforts toward orderly zoning and planning.

III. THE GROUNDS OF DECISION IN THE OPINIONS BELOW ARE FUNDAMENTALLY ROOTED IN FEDERAL CONSTITUTIONAL LAW; CERTIORARI SHOULD BE GRANTED SO THAT THIS COURT MAY REVIEW THE CORRECTNESS OF THE APPLICATION OF THOSE PRINCIPLES.

It may be contended that the identification of the true constitutional source of decision has not been delineated by the Supreme Court of Virginia with sufficient clarity to say that either the Federal or the State Constitution is the exclusive source of decision. Although a dispassionate reading of the decisions below supports the view that they are based on the Federal Constitution, even if the decisions are based on both Constitutions, *certiorari* is warranted. The observa-

tions of this Court in *Minnesota* v. *National Tea Co.*, 309 U.S. 551 (1930), as to whether *certiorari* should be granted when it is unclear whether the state court decision below rests on state or federal constitutional grounds support *certiorari* in these circumstances.

In the *National Tea* case, the state supreme court set aside a gross sales tax as unconstitutional, mentioning both the Equal Protection Clause of the Fourteenth Amendment and a provision of the state constitution as well.

This Court, per Justice Douglas, described the problem as follows:

> Respondents contend that the court held the statute invalid for violation not only of the Federal Constitution but also of the State constitution. Hence, they seek to invoke the familiar rule that where a judgment of a state court rests on two grounds, one involving a federal question and the other not, this Court will not take jurisdiction. *Id.*, 309 U.S. at 554.

In this passage, the Court is referring to the doctrine that if the state court decision is supported by an adequate and independent state ground the Supreme Court will not take jurisdiction to decide the federal question. However, this Court in the *National Tea* case was very careful to say that the possibility that the decision below was based on a state ground by no means necessarily excludes review of the state decision:

> Enough has been said to demonstrate that there is considerable uncertainty as to the precise grounds for the decision. . . .
>
> * * *

> But that does not mean that we should dismiss the petition. *Id.*, 309 U.S. at 555.

The Court then stated that it had in a number of situations, among them ". . . where the grounds of the state decision were obscure," vacated the judgment below and remanded the cause ". . . so that the federal question might be dissected out or the state and federal questions clearly separated." *Id.*, 309 U.S. at 555-56.

In *National Tea*, the Court described the need for *certiorari* in circumstances such as those presented by the instant petition in language which very nearly describes the present situation:

> It is important that this Court not indulge in needless dissertations on constitutional law. It is fundamental that state courts be left free and unfettered by us in interpreting their state constitutions. *But it is equally important that ambiguous or obscure adjudications by state courts do not stand as barriers to a determination by this Court of the validity under the Federal Constitution of state action. Intelligent exercise of our appellate powers compels us to ask for the elimination of the obscurities and ambiguities from the opinions in such cases.* Only then can we ascertain whether or not our jurisdiction to review should be invoked. Only by that procedure can the responsibility for striking down or upholding state legislation be fairly placed. *For no other course assures that important federal issues, such as have been argued here, will reach this Court for adjudication; that state courts will not be the final arbiters of important issues under the Federal Constitution;* and that we will not encroach on the constitutional jurisdiction of the states. This is not a mere technical rule nor a rule for our convenience. It touches the division of authority between state courts and this Court and is of equal importance

to each. Only by such explicitness can the highest courts of the states and this Court keep within the bounds of their respective jurisdictions. *Id.*, 309 U.S. at 557 (emphasis added).

A scholar has recently offered some perceptive observation on the desirability of Supreme Court appellate review in circumstances such as these:

> Cases may arise in which a statement by the Court on the federal issues presented would serve a useful purpose. Perhaps the most frequently recurring of the situations in which an assertion of such power by the Court would be useful is that in which the state court has invalidated a statute under both state and federal constitutions. Although the state ground in that situation is, technically, both "independent" and "adequate," *the frequency with which state courts, in interpreting state constitutions, rely on federal decisions construing a similar provision in the federal constitution suggests that the Court ought not to be blind to the leadership that it in fact exerts in this area.* Even when it does not seem likely that the judgment in the case at bar will be affected, thought must be given also to the *potential impact in other cases* and the desirability of assuring that "the responsibility for striking down or upholding state legislation be fairly placed." In such cases, there is no overriding policy that requires the Court to stay its hand. The independence of state courts would not be sacrificed since the judgment would be undisturbed. Moreover, the record before the Court will normally be fully adequate to illumine the issues and the Court will frequently have the benefit of adversary proceedings, thus removing the primary objections to "advisory opinions." Sandalow, *Henry* v. *Mississippi and the Adequate State Ground: Proposals for a Revised Doctrine*, 1965 Sup. Ct. Rev. 187, 201-202. (emphasis supplied).

What is noteworthy about Professor Sandalow's comments is that he calls for the grant of *certiorari* even if the decision below rests entirely on state constitutional grounds where such a ground parallels a similar provision in the Federal Constitution and where in such circumstances this Court exercises leadership.[38]

Furthermore, it should be noted that *Euclid* itself, although it arose in the federal courts and thus came to this court through a different jurisdictional route, had the same parallelling of the issues in that the lower court decision was based both on the state and federal constitutions. The Court nevertheless discussed the matter as if it arose solely under the Federal Constitution:

> The ordinance is assailed on the grounds that it is in derogation of § 1 of the Fourteenth Amendment to the Federal Constitution in that it deprives appellee of liberty and property without due process of law and denies it the equal protection of the law, and that it offends against certain provisions

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[38] The Supreme Court of Virginia has acknowledged its deference to this Court in the area in question.

> It is a settled rule of the Supreme Court of the United States, if the question of reasonableness is fairly debatable to hold that it will not substitute its judgment for that of the legislative body charged with the primary duty and responsibility of deciding the question. *Zahn* v. *Board of Public Works, supra,* 274 U.S. 325 (1927).
>
> We are, therefore, of opinion to sustain the ordinance under review as constitutional. In this we simply agree with and follow the Supreme Court of the United States, the final arbiter of such questions. *Martin* v. *City of Danville,* 138 S.E. 629, 630 (Va. 1927).

See also McIntosh v. *Commonwealth,* 191 S.E.2d 791, 794 (Va. 1972)—". . . does not offend the provisions of the Fourteenth Amendment to the Constitution or the *cognate* provisions of the Constitution of Virginia." (emphasis added.)

> of the Constitution of the State of Ohio. *Euclid* v. *Ambler Realty Co.*, 272 U.S. 365, 384 (1926).
>
> * * *
>
> It is not necessary to set forth the provisions of the Ohio Constitution which are thought to be infringed. The question is the same under both constitutions, namely, as stated by appellee: Is the ordinance invalid in that it violates the constitutional protection "to the right of property in the appellee by attempted regulations under the guise of the police power, which are unreasonable and confiscatory?" *Id.*, at 386.

For the foregoing reasons, the petitioner submits that the grounds of decision in the opinions below are fundamentally rooted in federal constitutional law and *certiorari* should be granted so that the court may review the correctness of the application of those principles.

IV. THE EFFECTS OF THE ALLMAN AND WILLIAMS OPINIONS.

A. Effects In Fairfax County And In Virginia

Implicit, but unstated, in both of these decisions is the fact that the courts have determined that public facilities will be available at some relatively specific time in the future for specific properties.

The actions required by the court will allow the development of incrementally more dwelling units than the present zoning district permits. As can be discerned also from both opinions, there is a distinct difference of opinion over whether public facilities in these areas of the County are adequate.

In the *Allman* decision, 211 S.E.2d at 51, the Supreme Court of Virginia found:

> There was evidence before the lower court from which it reasonably could have found that at the

> time the Board considered the Allman application the necessary public facilities were either available or *would become available by the time the project had been developed.* (emphasis added)

In the *Williams* decision, 216 S.E.2d at 39-40, there was similar language:

> As previously noted, the trial court made four important findings: (1) public facilities were or *soon would be available* to serve the land in question, . . . (emphasis added).
>
> We are of the opinion that the record supports each and every one of these findings of the trial court.

The courts below have found this in the face of determinations by the legislative body that public facilities are not presently adequate and will not be adequate in the near future to support the type of development proposed. Such determinations by the courts might be appropriate if the courts were acting in a representative capacity for all the people within the jurisdiction, or if the courts had the power to tax and appropriate funds for needed facilities. However, it is the legislative body's duty and function to determine, based on the health, safety, and general welfare of the entire community, *Berman* v. *Parker,* 348 U.S. 26 (1954), where public facilities are to go. The court here has usurped an additional set of legislative functions and has done so within the very limited confines of litigation between a single property owner and the County Board.

The court's decisions will allow the developers in the cases at bar to develop at the densities they desire. This will force the legislature to legislatively react—*i.e.,* to provide public facilities/public services for the

people who soon inhabit these developments. The concept of planning for future development, whether residential units or public facilities, is no longer a viable one in Virginia. The local legislature can only react to the private developer—wherever and whenever he elects to build, the locality must provide his development with facilities sufficient for the inhabitants generated thereby.[39]

The County Board must, through such police power as remains after *Allman* and *Williams,* make some provision for public facilities to accomodate this new development and do so in a manner which avoids depriving those who are presently sharing existing inadequate facilities.

In addition to this effect, the directions of the court in remanding and directing certain actions constitutes a direct invasion of the police power of the state. The federal courts have refused to take such a step.

> [T]his court may not, without an unwarranted invasion of the police power of the city, an arm of the state, substitute its judgment for that of the city council. *Downham* v. *City Council of Alexandria,* 58 F.2d 784, 788 (E.D. Va. 1932).

The instructions of the Supreme Court of Virginia to the trial courts are explicit in the results which they require. Both orders are nearly identical, with only

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[39] Such a requirement could prevent compliance with the mandates of the Federal Water Pollution Control Act amendments of 1972, 33 U.S.C. § 1251 *et seq.*, and the Clean Air Act of 1970, 42 U.S.C. § 1857 *et seq.* Both of these pieces of legislation require planning—looking to future development areas and needs.

minor variations in language. *Allman,* 211 S.E.2d at 55-56; *Williams,* 216 S.E.2d at 41-42.

The Board of Supervisors, prior to taking the required action, must afford notice and the opportunity for a hearing to all those who will or may be affected. Fifth and Fourteenth Amendments to the United States Constitution; *Va. Code Ann.* § 15.1-431. *Appendix, infra* p. 85.

However, the requirement that the trial court enjoin the Board from taking any action which would disallow the use of PDH-3 or R-12.5 by Allman is a direct and improper invasion of the police power. The court is directing the legislative body to take action "a" or action "b", when the legislative body would ordinarily have any number of reasonable options.[40]

The effect of the court taking such action—directing the enactment of specific legislation—is to deprive citizens of Fairfax County of their rights to due process and equal protection of the laws. Those very people whose rights may be directly affected—those with children in overcrowded classrooms which will have to accommodate even more children; those with inadequate fire services who will have to share an increased inadequacy with persons populating the Allman property—have no longer a right or ability to affect those decisions.[41]

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[40] This presents no finality problem because only the legislature may perform a legislative act.

[41] If an interested citizen testifies or otherwise submits evidence against a higher density for the Allman and Williams properties at the new hearings ordered by the court, this evidence can have no effect because the legislature's marching orders are clear. These hearings may well be a sham. Adjoining or nearby property owners to the Allman property were able to testify at the original

The court's ruling will result in one of two possible sequences of events. The Board of Supervisors, acting under court order, may schedule appropriate hearings, receive testimony, and act within the parameters of the court's order—parameters so narrow as to leave the Board virtually no discretion, thus making a sham of the notice and hearing process. Alternatively, the Board may defy the court's order and allow the trial court to enter further orders of such a nature as to bring about the situation which the appellate court had directed. In effect, the courts will have legislated, without any notice or hearing, in derogation of the rights of those who have a direct interest in the ultimate development permitted on the property in question.

This directive of the court, if exercised, both usurps the police power of the Board by judicial legislation and precludes the possibility of any relief for neighboring property owners even though they have been denied due process.

B. Effects Nationwide

In the cases presented, the issue of the locality's power to zone was not raised, that question having been decided previously by the Supreme Court of Virginia. *West Bros. Brick Co.* v. *City of Alexandria*, 192 S.E. 881 (Va. 1937), *appeal dismissed*, 302 U.S. 658 (1937),

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hearing in October, 1971, but to have full constitutional and statutory notice, these owners near the Allman property would have had to know that they must testify at the Clinch hearing (one mile away) to have protected their legal rights. The Clinch mistake mandated the Allman rezoning. The domino theory created by the courts below makes it impossible for citizens to participate effectively. How can a property owner who lives near the third domino know that he must react even though that domino may be two-and-a-half miles away (Reston) or in another county (Sterling Park). The decision below necessarily violates the due process notice requirements of other landowners.

rehearing denied, 302 U.S. 781 (1938). Further, neither Mr. Allman nor Mr. Williams raised the issue of whether the Board had considered the proper matters prior to making its determination. Rather, they complained of the result reached by the Board, after the Board had considered proper matters. The implications of the court's actions become very significant when viewed in this light.

The *Standard Zoning Enabling Act* was prepared by the U.S. Department of Commerce in 1922. This legislation has been adopted in Virginia and although modified and amended several times, is very similar to the zoning enabling legislation in nearly every other state. As noted by Professor Norman Williams, in his recent volumes of *American Land Planning Law:*

> For the purpose of this work, by far the most important of these is the Standard Zoning Enabling Act, adopted at one point in all 50 states, and still in effect (with various modifications) in 47 states. This is a remarkable phenomenon in the field of public law—that all the states should have essentially the same enabling legislation. N. Williams, 1 *American Land Planning Law* § 18.01 (1974).[42]

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[42] The SZEA [Standard Zoning Enabling Act] and SPEA [Standard Planning Enabling Act] were based on two important assumptions: (1) the "owner" of land (private person or governmental agency) has the power to use or develop his land as he wishes except as specifically restricted in state and local legislation; (2) The public interest of the state lies in *authorizing* local government to control the development decisions of an owner of land within the borders of the local government.

• • •

The purposes for which the local government could act under the SPEA and SZEA were the full inventory of constitutionally permissible purposes—promotion of health, safety, morals, and general welfare—but the purely local public interest was dominant. American Law Institute, *A Model Land Development Code,* "Proposed Official Draft No. 1," p. 2 (1974).

The statutory purposes of zoning ordinances in the *Standard Act* were:

> designed to lessen congestion in the streets; to secure safety from fire, panic, and other dangers; to promote health and the general welfare; to provide adequate light and air; to prevent the overcrowding of land; to avoid undue concentration of population; to facilitate the adequate provision of transportation, water, sewerage, schools, parks, and other public requirements. *Id.*, at 363.

See Va. Code Ann. § 15.1-489, *Appendix, infra*, p. 89.

The decisions of the Supreme Court of Virginia, whether followed or not, can be argued as precedent by landowners in nearly every state. The net effect of these cases could be to return the United States to the uncontrolled situation that existed prior to the approval of zoning by this Court in *Euclid, supra*.[43]

The inability of a locality to discriminate between properties will mean logically that all properties must be placed in identical zoning categories. As noted by the City of Charlottesville, in its *amicus* brief seeking a rehearing of the *Allman* decision:

> The obvious inference from these findings is that in its drawing of zoning lines the legislative body may not assign properties to different zoning categories within the same general neighborhood. Of course, the precise area comprising a neighborhood is not defined, but by inference it may extend at least 2.5 miles. Opinion, *supra*, at

[43] Another possible effect would be for local jurisdictions to limit their planning to densities that are considered acceptable in the short range, thus precluding the possibility of long-range potential being used against the locality to establish "unreasonableness." This would, of course, defeat most of the purposes of long-range comprehensive planning.

> 10-12. Little or no consideration appears to have been given to the differing factors that may have influenced the Board's varying decisions within their "neighborhood" and over the course of its development during fifteen years. Moreover, every parcel of land in the county is in close proximity to some other parcel. Logically extended, the rationale applied by the Court in *Allman* would create a "domino" reaction ultimately resulting in a single uniform zoning classification throughout the entire county. *Allman*, Brief Amicus Curiae of the City of Charlottesville, In Support of Appellants' Petition for Rehearing, p. 8.

The basic concept of zoning—that certain types of uses should be separated from other types of uses—would no longer have any validity. The domino effect, an explicit concern of the California and Maryland courts, has become a reality in Virginia. In *Wilkins* v. *City of San Bernadino*, 175 P.2d 542, 549 (Cal. 1946), the court stated:

> Often there may be little differences in the character of the property on either side of the zoning line, but such a showing will not justify a judicial alteration or extension of the boundaries. If an owner could compel the extension of the "island" by any such showing, then the next adjoining owner in turn could likewise make the same kind of showing and obtain another extension of the island to his property and in short time *there would be an end to the effectiveness of all zoning legislation.* (Emphasis added.)

See also, Montgomery County Council v. *Shiental*, 238 A.2d 912 (Md. 1968). Under the legal theory of the court below, zoning would cease to be a legislative decision. It would merely be a reactive legislative function dictated by long-preceding legislative decisions.

The second basic concept subordinated by the Supreme Court of Virginia is that which allows localities to take affirmative action to provide for the public health, safety, and general welfare. Virginia localities are now relegated to taking those defensive actions which are necessary to protect the health, safety and general welfare. The distinction is crucial since in the former, a locality is given a presumption of propriety —that where beneficial results are intended, a local action will be sustained unless there is a violation of Constitutional rights. In the latter, the locality must be able to justify its every action and establish the reasonableness of the action in relation to specific aspects of health, safety, and general welfare. The latter burden, placed on any state legislative body, clearly infringes on both the police power and on the doctrine of separation of powers. The legislative branch can no longer function to perform its duties imposed under both federal and state law.

CONCLUSION

It is submitted that the Supreme Court of Virginia erred in holding that the refusals to grant the rezoning classifications in *Williams* and *Allman* violated the Equal Protection Clause and the Due Process Clause of the Fourteenth Amendment of the United States Constitution.

Two respected commentators on the jurisdiction of this Court have specified as an appropriate ground for the exercise of the discretionary *certiorari* jurisdiction, the following category of cases:

> *Where a state court* has decided a substantial and unsettled federal question arising under the Constitution or where it *has rendered an errone-*

ous or at least a doubtful decision on such a question, the Supreme Court frequently grants the petition for a writ of certiorari despite the absence of a conflict. (emphasis added.) Stern and Gressman, *Supreme Court Practice* 193, (4th ed. 1969).

For the reasons detailed above, Petitioner contends that in the light of the consistent interpretation afforded by this Court to Fourteenth Amendment-based challenges to state zoning decisions from *Euclid* to *Belle Terre,* the decisions below disclose an erroneous decision on substantial federal constitutional questions.

For the reasons set forth herein, this Petition for a Writ of Certiorari should be granted.

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